REPORT OF THE COMMISSION OF INQUIRY INTO MUNICIPAL LABOUR RELATIONS WITH RECOMMENDATIONS

Eric L. Teed, C.D., Q.C.
Commissioner

May, 1987

REPORT OF THE COMMISSION OF INQUIRY INTO MUNICIPAL LABOUR RELATIONS WITH RECOMMENDATIONS

The cost of producing a report of this size prohibits us from providing more than one copy to each "affected party". Additional copies of the report are available at a cost of $7.00 per copy and may be obtained by writing directly to:

Evaluation Branch
Labour and Employment Division
Department of Labour
P. O. Box 6000
Fredericton, NB
E3B 5H1

A cheque or money order, payable to the Minister of Finance, must accompany each order.

RAPPORT DE LA COMMISSION D'ENQUÊTE SUR LES RELATIONS DE TRAVAIL DANS LES MUNICIPALITÉS AVEC RECOMMENDATIONS

Les coûts élevés de production d'un rapport aussi volumineux nous empêchent d'en fournir plus d'un exemplaire à chaque "partie en cause". Vous pouvez cependant vous en procurer des exemplaires additionnels, moyennant la somme de 7 $ chacun, en écrivant à l'adresse suivante:

Direction de l'évaluation
Division du travail
et de l'emploi
Ministère du Travail
C.P. 6000
Fredericton (N.-B.)
E3B 5H1

Les commandes doivent être accompagnées d'un chèque ou d'un mandat de poste libellé à l'ordre du ministre des Finances.

REPORT OF THE COMMISSION OF INQUIRY INTO MUNICIPAL LABOUR RELATIONS WITH RECOMMENDATIONS

Eric L. Teed, C.D., Q.C.
Commissioner

May, 1987
ISBN 0-88838-897-7

PREFACE

On April 4, 1986, the Province of New Brunswick appointed a Commission of Inquiry under section 90 of the *Industrial Relations Act* to inquire into and make recommendations on the subject of labour relations in New Brunswick municipalities. Eric L. Teed, C.D., Q.C., was appointed as the sole Commissioner.

The terms of reference of the Commission were stated as follows:

(1) to examine the history of current legislation, policy and practice respecting labour relations in New Brunswick;
(2) to identify and inquire into those municipal services performed by employees under the *Industrial Relations Act* which are essential to the health, safety and security of the public, and to consider the work and recommendations of the New Brunswick Industrial Relations Council and other studies, reports, etc., on the subject, both in New Brunswick and other jurisdictions;
(3) to hold public hearings and accept briefs from unions, employers, and the public;
(4) to consider the appropriateness of a common legislative format for dispute settlement in essential municipal services to the public during any collective bargaining eventuality; and
(5) to make recommendations to the Minister of Labour in any areas which the Commission deemed appropriate.

The Commission was given access to appointed legal counsel and was authorized to request the Deputy Minister of Labour to provide secretarial, administrative, technical, and research assistance as required.

The Commission determined that public hearings would not be undertaken until after the municipal elections scheduled throughout the Province for May. The initial phase of the inquiry was, therefore, research oriented. Files and resource materials available in the field of municipal labour relations were gathered and reviewed. Out-of-province travel was initiated to obtain information on the experiences of other jurisdictions in municipal labour relations. Requirements for statistical information were determined and various research projects were launched.

The Commission invited all unions in the province, not only those in the municipal sector, to make submissions. As well, a number of other organizations were invited to make presentations.

In May, 1986, a notice was published in all provincial newspapers inviting the public to submit briefs and make presentations to the Commission. As well, each person who offered as a candidate in the municipal and school board elections, was sent a questionnnaire related to essential services.

In August, 1986, a second notice was published in all newspapers in the province indicating the dates and locations for hearings and again encouraging interested parties to appear before the Commission.

On October 8th, public hearings commenced in Fredericton. The Commission sat in eleven different locations: Fredericton, Dalhousie, Edmundston, St. Stephen, Woodstock, Bathurst, Shippagan, Moncton, Newcastle, Sussex, and Saint John. The final hearing was held in Saint John on November 14, 1986. A total of fifty-one briefs were publicly presented at the hearings. In addition, five other briefs which were not formally presented were received. All participants at the hearings were informed that they had until December 31, 1986, to respond to the other submissions. Five submissions were received in response to this invitation. All submissions to the Commission were made available to any one requesting them.

The Commission attended several industrial relations seminars. It met with Deputy Ministers of Labour in seven (7) provinces, several Chairmen of Industrial Relations Boards and officials from a number of Labour Departments. In addition, the Commission met with a number of Provincial Deputy Ministers of Municipal Affairs, various academics in the field of labour relations, and persons involved in interest arbitration across the country. Meetings were also held with individuals from the union and management community in various municipalities in the province of New Brunswick, as well as in other jurisdictions.

The Commission is indebted to George A. McAllister, legal counsel to the Commission, and to Marilyn Colwell, the Commission's executive officer. As well, the Commission would like to thank the Evaluation Branch of the Department of Labour for undertaking various research projects and, in particular, Gerald Kitchen who so willingly gathered all the statistical data, Blair Kuhn who analyzed collective agreement data and the questionnaire on essential services on the computer, and Dianne Muir who so capably handled secretarial and stenographic duties.

A special word of thanks to regular and special staff members in the Commissioner's office in Saint John, Shelley Sangster, Gwen Jones, Penny Georgoudis, Terry Taylor and Brenda Seale, who so cheerfully undertook their assignments and assisted in various ways.

It is not possible to report fully on the details of all meetings which the Commission attended or all materials to which the Commission had access, or to acknowledge properly the contribution of all the individuals and groups who assisted the Commission in carrying out its mandate. The co-operation and contribution of all was very much appreciated.

May 1987

Eric L. Teed, C.D., Q.C.

TABLE OF CONTENTS

PART 1 THE INSTITUTIONAL STRUCTURE FOR COLLECTIVE BARGAINING IN NEW BRUNSWICK MUNICIPALITIES - AN HISTORICAL PERSPECTIVE

I. THE FRAMEWORK AND DEVELOPMENT OF MUNICIPALITIES 1

A. THE CONSTITUTION 1

B. THE DEVELOPMENT OF MUNICIPALITIES 2

1. **Legislation** 2
2. **Growth of Services** 4
3. **Financial Arrangements** 5

C. CONCLUSION 6

II. THE DEVELOPMENT OF LABOUR LEGISLATION 7

A. THE CONSTITUTION 7

B. FEDERAL LEGISLATION 8

1. **Early Legislation** 8
2. **World War I** 9
3. **World War II** 10

C. PROVINCIAL LEGISLATION 11

1. **Early Legislation** 11
2. **World War I** 12
3. **World War II** 13

D. CONCLUSION 17

PART 2 FUNDAMENTAL ISSUES RELATING TO MUNICIPAL LABOUR RELATIONS.

I. DISTINCTION BETWEEN PUBLIC AND PRIVATE SECTOR BARGAINING 18

II. DISTINCTION BETWEEN PROVINCIAL AND MUNICIPAL BARGAINING 19

III. THE RIGHT TO STRIKE AND LOCKOUT 21

IV. TRENDS IN THE TERMS AND CONDITIONS OF EMPLOYMENT 25

V. POLICE 27

VI. FIRE 33

VII. CONCLUSION 37

PART 3 THE ORGANIZATION OF THE PARTIES FOR PURPOSES OF COLLECTIVE BARGAINING

I. APPROPRIATE EMPLOYEE UNIT 39

A. CERTIFICATION 39

B. SUPERVISORY/NON-SUPERVISORY UNITS 40

C. COMPOSITE BARGAINING UNITS 43

II. APPROPRIATE EMPLOYER UNIT 44

PART 4 THE DEFINITION OF ESSENTIAL SERVICES 50

PART 5 DESIGNATION

I. **DESIGNATION AND ITS ALTERNATIVES** 51

A. ARBITRATION 53

B. CONTINGENCY PLANS 53

C. DESIGNATION 56

II. **IMPLEMENTATION OF DESIGNATION** 58

A. INITIAL PROCEDURES 58

B. SUBSEQUENT DESIGNATION PLANS 61

III. **OPERATION OF THE SYSTEM** 62

A. THE ROLE OF THE MINISTER AND THE BOARD 62

B. BRIDGING THE COLLECTIVE AGREEMENT 63

C. THE ROLE OF THE EMPLOYER 63

D. THE ROLE OF WORKERS OUTSIDE THE BARGAINING UNIT..64

E. THE SELECTION OF THE WORK FORCE 64

F. OVERTIME 65

G. ENFORCEMENT 66

IV. **BALANCING THE SYSTEM** 68

PART 6 THE BARGAINING PROCESS AND THE RESOLUTION OF INTEREST DISPUTES IN THE MUNICIPAL SECTOR

I. **NOTICE TO BARGAIN** 70

A. TIMING 70

B. CONTENTS 71

C. THE ROLE OF THE MINISTER OF LABOUR 72

D. THE DATE OF THE FIRST MEETING 73

II. **METHODS OF DISPUTE RESOLUTION** 74

A. ALTERNATIVES 74

B. THE STRIKE/LOCK-OUT ROUTE 79

1. Public Bargaining 79

2. The Fact Finding Route 86

C. THE ARBITRATION ROUTE 89

1. The Framework For Arbitration 89

a. The Appointment of Arbitrators 89

b. Maintaining Confidence 92

i) The Arbitrator 92

ii) The System 92

2. The Conventional Arbitration Route 95

3. The Mediation-Arbitration Route 97

4. The Final Offer Arbitration Route 100

D. BALANCING THE SYSTEM 103

1. The Last Offer Vote 103

2. Picketing 106

3. Bridging The Collective Agreement 110

4. The Procedure In The Event Of An Emergency 112

PART 7 ADMINISTRATION OF THE COLLECTIVE AGREEMENT

I. THE FRAMEWORK FOR THE ADMINISTRATION OF THE COLLECTIVE AGREEMENT 114

A. LABOUR MANAGEMENT COMMITTEES 115

B. GRIEVANCE MEDIATION 118

C. TRADITIONAL GRIEVANCE ARBITRATION 122

D. THE COMMISSIONER FORM OF ARBITRATION 127

E. THE EXPEDITED ARBITRATION SYSTEM 129

II. ILLEGAL STRIKES AND LOCK-OUTS WHILE COLLECTIVE AGREEMENT PROVISIONS IN EFFECT 132

A. ILLEGAL STRIKES AND LOCK-OUTS 132

B. PROCEDURES 138

PART 8 ARBITRATORS

I. AN EVALUATION 142

II. THE REGISTRATION OF ARBITRATORS 143

III. TIME CONTROLS 144

IV. COST CONTROLS 146

A. CONTROLS ON ARBITRATORS 146

B. CONTROLS ON THE PARTIES 147

APPENDICES

A SUMMARY OF RECOMMENDATIONS

B BARGAINING PROCEDURE (FLOWCHART)

C IMPLEMENTATION OF DESIGNATION (FLOWCHART)

D LIST OF SUBMISSIONS

E BIBLIOGRAPHY

PART 1 THE INSTITUTIONAL STRUCTURE FOR COLLECTIVE BARGAINING IN NEW BRUNSWICK MUNICIPALITIES - AN HISTORICAL PERSPECTIVE

I. THE FRAMEWORK AND DEVELOPMENT OF MUNICIPALITIES

A. THE CONSTITUTION

The *Constitution Act* divides legislative jurisdiction in Canada between the federal and provincial governments. Only the federal government and provincial governments are recognized as independent legislative authorities by the *Constitution Act*. Municipalities do not have independent legislative jurisdiction under the *Constitution Act*.

Section 92(8) of the *Constitution Act* assigns to the provinces jurisdiction over "municipal institutions in the province". Municipalities, therefore derive their legal status from the province. They are subject to the control of the legislature which creates them. As such they do not have the same legal status or degree of independence as either the federal or provincial government.

H. J. Whalen in *The Development of Local Government In New Brunswick* offers the following commentary in this regard:

> Under the Canadian Constitution municipal authorities are not assigned an independent status. Legally speaking, municipalities do not possess constituent autonomy. Each province is empowered under Section 92 of the B.N.A. Act to establish its own municipal system. Local authorities in New Brunswick, like those in all other provinces, are in consequence the creatures of the provincial legislature. The structure of local government may be changed at the will of the Legislative Assembly, and the powers assigned by delegation to municipalities may be altered, added, subtracted or withdrawn. Depending upon the controlling statutes, municipal supervision may be exercised either by legislative act or merely by edict of the Lieutenant Governor-in-Council. Indeed, in a growing number of instances, power to direct or prohibit action by local authorities is assigned by delegation to a given Minister, to a provincial board or commission, or even to a specific provincial official such as a deputy minister of municipal affairs or the director of community planning.[1]

[1] H.J. Whalen, The Development of Local Government in New Brunswick (Fredericton, N.B.: 1963) p. 103

Notwithstanding the fact that municipalities do not enjoy the same legal status as the federal or provincial government they have come to play a major role in delivering services to the public. Municipalities have grown substantially since Confederation and they now carry out a variety of responsibilities. Many of the services provided by municipalities have evolved and changed since Confederation. Municipal services are now viewed quite differently than they were at the time of Confederation. Many of the services delivered by municipalities are directly related to the "health, safety or security of the public". There can be no doubt that municipalities now constitute an important level of government.

The Royal Commission on the Economic Union and Development Prospects for Canada stated in its report:

> In terms of the lives that Canadians lead and the concerns they have, local government is a third order of government. To many, it is the most important order, dealing with matters of the most direct and immediate concern, and providing the most accessible and effective way to take advantage of many federal and provincial programs.[1]

B. THE DEVELOPMENT OF MUNICIPALITIES

1. Legislation

On July 7, 1784 the province of New Brunswick was organized when it became independent from Nova Scotia. On May 18, 1785, a Royal Charter established Saint John as a municipal corporation.[2] Saint John was the first municipal corporation in what was to become Canada.

---

[1] Royal Commission on Economic Union and Development Prospects for Canada Report (Ottawa: Minister of Supply and Services Canada, 1985) Vol. III, p. 373.
[2] Canada's First City (Saint John, New Brunswick: Lingley Printing Co. Ltd., 1962).

The next municipality to be incorporated in New Brunswick was Fredericton. While Saint John had been incorporated pursuant to Royal Charter, Fredericton was incorporated as a town pursuant to a special act of the provincial legislature in 1848. In 1855 legislation was passed to incorporate Moncton as a town. The fact that the legislature incorporated Fredericton and Moncton as towns during this period was indicative of the growing importance of municipalities within the province.

In 1896 the *Towns Incorporation Act* was enacted to facilitate the incorporation of towns by proclamation. In 1920 the *Villages Act* was enacted to permit the incorporation of villages.[1] Notwithstanding the *Towns Incorporation Act* and the *Villages Act*, there was little uniformity in the powers and responsibilities of municipalities.

The *Municipalities Act* was adopted by the legislature in 1975. This was a comprehensive piece of legislation which defined the relationship between the provincial government and the municipalities of the province, the role of municipalities, and the basis for financing municipal corporations.

The *Municipalities Act* resulted in much greater centralization of control over municipalities in the province. For instance, the province determined the timing of municipal elections and the manner in which municipal governments were to operate. The responsibilities and jurisdiction of municipal corporations was also set out in the act. As well, the province firmly established control over the raising and expenditure of money by municipal corporations.

---

[1] H.J. Whalen, The Development of Local Government in New Brunswick (Fredericton, N.B.: 1963) p. 7.

2. Growth of Services

It is interesting to note that when the City of Saint John was established by Royal Charter the only service which the City was required to perform was the maintenance of the public peace by constables elected from each ward. Over the years, however, the demand for municipal services has grown. New Brunswick municipalities now provide a diverse range of services to their citizens. Such services vary throughout the province depending on the municipality's status as a village, town or city. In addition, services often vary widely between municipalities of the same status. It is important to note, however, that the only service which municipalities are required to provide pursuant to the *Municipalities Act* is police protection. All other municipal services are optional in the sense that a municipality is not required to provide them by legislation.

At one time New Brunswick was basically a rural province. Now, however, the largest part of New Brunswick's population is centered in and around its municipalities. With increasing urbanization people are looking to municipalities for more government services than ever before. Many municipal services are labour intensive rather than capital intensive. As such, good labour relations are important if the municipalities in New Brunswick are to provide an adequate level of services to their citizens.

Urbanization and the growth in the demand for services from municipalities has created a dependence on municipalities for services not previously provided. Given modern lifestyles, many of the services provided by municipalities have become extremely important to their citizens. Some services which may have been considered optional when introduced by municipalities have now taken on the character of essential services. At the same time, however, it remains a fact that what is considered to be an essential service very much depends on the needs of a particular citizen and the experience of that citizen as he or she has been affected by the withdrawl of a service at any particular point in time.

3. Financial Arrangements

The major expenditures which municipalities incur are for the provision of police, fire, garbage collection and street maintenance services. These expenditures are normally met from a municipality's general operating revenues. Most municipalities are able to finance water and sewerage services through local water rates.

There are three major sources of financing for New Brunswick municipalities. They are:

1. non-tax revenues,
2. municipal real property taxes, and
3. unconditional grants from the province.

Non-tax revenues account for approximately nine percent of municipal revenues. These revenues are normally generated by charges for licenses, fines, investments in property which may be rented, and other forms of income earning enterprises.

Municipal real property taxes generate between twenty-five and fifty percent of revenues for most municipalities. This is an important method of raising revenue. The importance of the municipal real property tax, however, is very much determined by the economic health of the municipality. It is important to appreciate that while the demand for municipal services may remain relatively constant, the economic climate does not. As a result, in a poor economic climate some municipalities may find themselves in a difficult financial situation.

The basis for the municipal real property tax is the true market value of real property. The municipality can set a rate for taxation on the property, however, the rate which is set is subject to overall control by the province.

The unconditional grant from the province represents from forty-one to sixty-six percent of municipal revenues depending on the municipality. The purpose of the unconditional grant is to enable municipalities to provide comparable standards of services without excessive municipal taxation.[1] The fact that the province controls the unconditional grant results in the province having indirect control over municipalities.

C. CONCLUSION

It is clear that although New Brunswick municipalities have no independent legal status under the *Constitution Act* they nevertheless constitute an important level of government within New Brunswick. It is also clear that the province of New Brunswick exercises considerable political and economic control over municipalities. The province has, however, delegated significant responsibilities to municipalities to discharge. The responsibilities which municipalities are required to discharge are important to the citizens of New Brunswick.

Municipal corporations are labour intensive rather than capital intensive. The effective delivery of municipal services depends on the effective management of personnel. In order to manage personnel effectively a municipal corporation must have the authority to conduct an effective labour relations policy. This means that a municipal corporation must have the power and flexibility to negotiate and administer its own collective agreements. This is necessary, notwithstanding the fact that the provincial government controls a major part of the budget of most municipal corporations. The Commission is of the opinion that municipal corporations must have the authority to manage their labour relations if they are to be responsible for delivering essential services to the public.

[1] Source for percentage figures: Report - Review of New Brunswick's Unconditional Grant to Municipalities (Fredericton: Province of New Brunswick, 1986) pp. 5-14.

II THE DEVELOPMENT OF LABOUR LEGISLATION

The Commission is of the opinion that in order to understand employer-employee relations in the municipal sector in New Brunswick today, it is important to have an understanding of the development of labour legislation. The legislation enacted by parliament and the legislatures reflects the political, economic, and social events which led them to adopt the legislation. In enacting labour legislation, legislators have always sought to balance the interests of the public, the employer and the employees given the political, economic and social conditions of the time. As conditions change it will be necessary for legislators to modify the legislation. A workable balance is not always easy to achieve.

A. THE CONSTITUTION

The *Constitution Act* divides legislative jurisdiction between the federal and provincial governments. Nowhere in the *Constitution Act*, however, is there a specific reference to labour law as a class of subject. It is not specifically allocated to either the federal or provincial governments.

Initially, the federal government sought to regulate labour relations as part of its jurisdiction under section 91(2) of the *Constitution Act* to regulate "trade and commerce". The provincial government sought to regulate labour relations under section 92(13) of the *Constitution Act* which is "property and civil rights in the province". The jurisdictional battle to regulate labour relations continued until 1925 when it was resolved by the Privy Council in *Toronto Electric Commissioners v Snider*.[1] The Privy Council

---

[1] *Toronto Electric Commissioners v Snider* [1925] A.C. 396, [1925] 1 W.W.R. 785, [1925] 2 D.L.R. 5 revg 55 O.L.R. 454, [1924] 2 D.L.R. 761 (S.C.) see also [1924] 1 D.L.R. 101.

confirmed the jurisdiction of the provincial government to regulate labour relations pursuant to their power to regulate "property and civil rights in the province". Today, provincial governments are responsible for regulating over ninety percent of the labour force in Canada while the federal government has been confined to ten percent.

B. FEDERAL LEGISLATION

1. Early Legislation

Early Canadian labour legislation was influenced by trends in Europe, Great Britain and the United States. However, political, economic and social conditions in Canada were different. While Canada was still in the process of developing its natural resources, Europe and Great Britain had already passed through their industrial revolution. The manufacturing sector in Canada did not develop until long after it had developed in the United States. It is therefore not surprising that early Canadian labour legislation reflected trends in Europe, Great Britain and the United States.

The federal government was the first to enact labour legislation in Canada. In 1872 the federal government adopted legislation declaring that trade unions were not unlawful merely because they acted in restraint of trade. In 1886 the federal government established a Royal Commission to investigate the working conditions of factory workers. It reported finding long hours of labour, unsatisfactory wages, cruel treatment of female workers, and the use of child labour. It recommended that a Department of Labour be established to reform and monitor working conditions. It is clear that most of the early federal legislation dealing with labour was enacted for the purpose of improving conditions in the workplace. At the same time, laws which restricted the activities of labour unions were relaxed.

In 1900 the federal government enacted the *Conciliation Act* which established a system of voluntary conciliation for the purpose of protecting the public interest where it was perceived that a work stoppage was prejudicial to those not participating in a strike. The legislation marked the beginning of the two step procedure of conciliation officer and conciliation board. These features are still part of Canadian labour legislation. The Act also introduced voluntary arbitration.

In 1907 Parliament passed the *Industrial Disputes Investigation Act* requiring compulsory investigation of disputes prior to a strike or lockout. This feature still exists in Canadian labour legislation and distinguishes it from either English or American labour legislation where no parallel provision can be found.[1]

2. World War I

Following the outbreak of World War I, parliament enacted the *War Measures Act* of 1914 which authorized the federal government to take whatever steps were necessary for the security, defence, peace, order and welfare of Canada.[2]

Under the authority of this statute, the *Industrial Disputes Investigation Act* was amended in 1918 to apply to all industries essential to the war effort. The result of this legislation was that the labour laws were extended to a broad section of society which had not previously been subject to labour legislation. This no doubt changed the perception of labour legislation throughout Canada.

---

[1] George Adams, Canadian Labour Law (Aurora, Ontario: Canada Law Book Inc., 1985) p. 8.
[2] Alton W. J. Craig, The System of Industrial Relations in Canada (Ontario: Prentice-Hall Canada Inc.) p. 110.

3. World War II

Modern labour legislation evolved out of the desire of the federal government to ensure labour peace in the manufacturing sector during World War II. In order to ensure the production of essential war materials at reasonable levels during World War II it was necessary to have labour peace. On February 17, 1944 the federal government issued Order In Council P.C. 1003, being the Wartime Labour Relations Regulations. The thrust of P.C. 1003 is summarized by A.W.R. Carrothers in *Collective Bargaining Law In Canada*. It reads as follows:

> The Order sought to establish freedom of union organization, freedom of the individual employee, and freedom of the employer from union interference. The employer was prohibited from intruding into union affairs and from discriminating against workers for union activity; however, the employer's right to suspend, transfer, lay off or dismiss for cause was expressly preserved. In turn, unions were prohibited from meddling in employers' organizations and using coercion or intimidation to force union membership. In addition, the union was prohibited from engaging in activity on the employer's premises during working hours without the employer's consent, or from causing slowdowns and other restrictions on production.
>
> The Order established a system of compulsory collective bargaining. Employees in a unit determined by the Wartime Labour Relations Board to be appropriate could obtain a certificate of bargaining authority by electing representatives or by showing majority membership in a union. Membership in a trade union was determined by the existence of a written request from the employee that the union select representatives on his behalf. Provision was made for bargaining with more than one employer and by more than one union.[1]

The effect of P.C. 1003 was to establish considerable uniformity in labour policy across Canada in that British Columbia, Manitoba, New Brunswick, Nova Scotia, and Ontario, suspended their provincial legislation and made the order applicable to their jurisdictions. The result is that the thrust and techniques which were established in P.C. 1003 became the foundation for labour legislation throughout Canada.

[1] A.W.R. Carrothers, E. E. Palmer and W. B. Rayner, Collective Bargaining Law In Canada Second Edition (Toronto: Butterworths, 1986) p. 51.

The next major development in federal legislation came in 1967 with the enactment of the *Public Service Staff Relations Act*. The Act created a new and distinct collective bargaining structure for federal public servants. It gave employees the option of settling their disputes through strike action or compulsory arbitration. However, the right to strike was qualified by section 79(1) which prevents employees designated as providing services necessary for the "safety or security of the public" from withdrawing their services.

C. PROVINCIAL LEGISLATION

1. Early Legislation

It appears that Saint John was the focal point of union activity in early New Brunswick. As early as 1865 the American National Union was attempting to organize branches in Saint John and in that same year the Ship-Labourers' Society was organizing in the City. The Knights of St. Crispin, a shoe workers' society, was active in Saint John as early as 1870.[1]

In 1903 New Brunswick adopted legislation setting out employment standards. The *Apprentices and Masters Act* set out the rights and responsibilities of apprentices and masters. The *Employer's Liability Act* dealt with the liability of employers for injuries to workmen (*Workmen's Compensation for Injuries Act*). In 1904 the *Bureau of Labour Act* was enacted providing for a Bureau of Labour (later repealed and replaced by an Order in Council creating the Department of Health and Labour in 1925). It is to be noted that the New Brunswick Bureau of Labour was created some eighteen years after the Federal Department of Labour was created in 1886. In 1904 the *Factory Legislation Commission Act* authorized the appointment of a Commission to report on the legislation

---

[1] H.A. Logan, Trade Unions In Canada, (Toronto: The MacMillan Company of Canada Limited, 1948) pp. 30-34.

regulating factories. In 1905 New Brunswick proclaimed the *Factories Act*, giving some protection to factory workers.[1]

2. World War I

The *Industrial Disputes Investigation Act* was adopted by Parliament in 1907. In 1918 it was amended to apply to all industries essential to the war effort. However, even after the end of hostilities, the federal Minister of Labour continued to apply the Act to provincial and municipal disputes with the consent of the parties. As a result of the decision by the Privy Council in *Toronto Electric Power Commissioners v Snider*[2] which limited federal jurisdiction in labour matters the *Industrial Disputes Investigation Act* was amended to provide for its application to any dispute which was within the legislative jurisdiction of a province provided the province had enacted legislation stipulating that disputes were subject to the federal statute.[3]

It is noteworthy that the first police union in the world was established in Saint John, New Brunswick, on September 10, 1918. It was chartered by the Trades and Labour Congress of Canada. It is also interesting to note that the New Brunswick Police Association in its brief stated that the members of this first police union were told "to get out of the union or off the job". When confronted with this message the union sought the assistance of the Saint John Labour Council and political action was taken. According to the brief, the Mayor for the City of Saint John and the Commissioner of Police were recalled by the citizens and defeated in the subsequent by-election. A con-

---

[1] Source: New Brunswick Department of Labour.
[2] *Toronto Electric Commissioners v Snider* [1925] A.C. 396, [1925] 1 W.W.R. 785, [1925] 2 D.L.R. 5 revg 55 O.L.R. 454, [1924] 2 D.L.R. 761 (S.C.) see also [1924] 1 D.L.R. 101.
[3] A.W.R. Carrothers, E.E. Palmer, W.B. Rayner, Collective Bargaining Law in Canada Second Edition (Toronto: Butterworths, 1986) p. 40 (New Brunswick, 1926 c.17).

ciliation board was eventually established and it was determined that the police could have a union which would be affiliated with the Trades and Labour Congress.

3. World War II

In 1945 New Brunswick enacted the *Labour Relations Act*, which was modelled after P.C. 1003. This legislation:

> provided for the election or appointment of employee bargaining representatives and for their certification by the Labour Relations Board and required the two parties to negotiate in good faith and to make every reasonable effort to conclude an agreement. There was provision made for a conciliation process and every collective agreement was required to include a clause requiring the settlement of grievances arising from the collective agreement without stoppage of work. The employer was forbidden to dominate or interfere with the formation of a union, or discriminate against union members. While a trade union could not compel anyone to join its ranks, it could negotiate with the employer to include a clause in the contract requiring membership in the union as a prerequisite of employment. There could be no strike or lockout during the term of the collective agreement. Where a dispute had arisen the employer could not alter the terms or working conditions of the employees, except on two months' notice.[1]

In 1951 the legislation was amended to include a provision that a municipality could by resolution declare itself to be an employer within the meaning of the Act. It is interesting to note that the legislature permitted New Brunswick municipalities to determine by themselves whether they wished to be governed by the labour legislation in the province.

The unique position of municipal police was recognized in 1955 when the Supreme Court of New Brunswick, in the case of *The Queen v The Labour Relations Board, ex parte the City of Fredericton* ruled that municipal police were not municipal employees as defined by the *Labour Relations Act* because they held a public office.[2]

---

[1] George W. Adams, Canadian Labour Law (Aurora, Ontario: Canada Law Book Inc., 1985) p. 51.

[2] *The Queen v Labour Relations Board, ex parte the City of Fredericton* [1955] 38 M.P.R. 26.

The *Labour Relations Act* was subsequently amended to permit a municipal council by resolution to recognize police officers as employees of the municipality as defined by the *Labour Relations Act*. By a subsequent amendment in 1960 police officers were deemed to be employees for purposes of the *Labour Relations Act*.

In 1962 the New Brunswick Department of Labour initiated a review of the *Labour Relations Act*. Subsequently, in 1965 a Select Committee of the Legislature, made up of eight members of the Legislative Assembly, was appointed to review and report on the *Labour Relations Act*.

In 1967 the Select Committee of the Legislature reported, among other things, that it had received petitions from a number of firefighter associations that:

> ...the constitution and by-laws of the International Association of Fire Fighters oblige any local union of that organization to waive the right to strike in the interest of public safety and welfare.
>
> As a result, Fire Fighters frequently find themselves frustrated in collective bargaining. Conciliation officers and conciliation boards are often unable to effect mutually satisfactory agreements and, where municipalities elect to reject recommendations made by conciliation boards, the Fire Fighters are unable to take the dispute further.[1]

The Committee recommended that firefighters have the right to proceed to binding arbitration whenever the parties could not reach a collective agreement. Legislation was subsequently enacted adopting this recommendation. For the first time, compulsory arbitration rather than the strike or lock-out became the method of resolving an impasse in collective bargaining.

In the 1960s the federal and provincial governments were confronted by union demands for public service bargaining. In New Brunswick the *Labour Relations Act*

[1] Report of Select Committee of the Legislature Established to Study the Labour Relations Act (Fredericton: Province of New Brunswick, 1967) pp. 33-34.

allowed the Lieutenant-Governor in Council pursuant to section 1(3a) to declare any person, corporation board or commission acting on behalf of Her Majesty to be an employer within the meaning of the *Labour Relations Act*. Indeed the New Brunswick Electric Power Commission and the New Brunswick Workmen's Compensation Board were declared to be employers under the Act. However, pressure was mounting for the extension of bargaining rights to the entire public service of New Brunswick. As a result the province of New Brunswick appointed a Royal Commission on Employer-Employee Relations in the Public Service of New Brunswick. It reported in 1967 recommending the enactment of a special statute extending collective bargaining to provincial government employees. The result was the *Public Service Labour Relations Act* which was modelled after the federal *Public Service Staff Relations Act*. Collective bargaining then got under way in New Brunswick's public sector.

The legislature in enacting the *Public Service Labour Relations Act* recognized that collective bargaining was a legitimate process for determining the terms and conditions of employment of employees in the public sector. At the same time the legislature recognized that there were important differences between bargaining in the private sector and bargaining in the public sector. It is noteworthy that the legislation governing the private sector has always been administered by the provincial government through the Department of Labour. With public sector bargaining, however, the government is the employer. It is clear that it would not be appropriate for the government to administer the system of public service bargaining where it acts as the employer. It therefore created an independent board (Public Service Labour Relations Board) to administer the Act governing public service bargaining. The Board is composed of five members, an independent chairman, two representatives of the employer, and two representatives of the employees. Another major distinction is the fact that provisions were incorporated in section 50(1) of the Act to ensure that a dispute between the parties would not

endanger the "health, safety or security of the public". Hence, the Act provided a system whereby employees providing services essential to "the health, safety or security of the public" could be designated to work during a strike.

In 1971 the Province of New Brunswick enacted the *Industrial Relations Act* governing collective bargaining in the private sector. This statute also applied to New Brunswick municipalities. It contained a number of special provisions applicable only to municipalities. As with the *Labour Relations Act* it deemed police officers to be employees for purposes of the *Industrial Relations Act*. It gave firefighters the right to proceed to binding arbitration in the event of a bargaining impasse. It also made provision for the protection of the safety of the public in the event of a police strike (see section 1(3), section 80 and sections 91(5) and 91(6) respectively).

In 1981 the *Industrial Relations Act* was amended to provide that regional police commissions (when established) are deemed to be the employer. However, if a municipality established its own police commission under its jurisdiction the municipality would continue to be recognized as the employer for purposes of the *Industrial Relations Act* (see section 1(3.1)).

Further amendments were made to the *Industrial Relations Act* in 1985. Section 13(3) of the Act was amended to allow firefighters to apply to the Industrial Relations Board for the division of composite bargaining units so that they could form their own units. This amendment was made because the Minister of Labour would not refer a dispute involving a composite bargaining unit with firefighters to interest arbitration. In addition, section 80(5) of the Act was amended to provide that where, by order of the Lieutenant-Governor in Council a police dispute is referred to interest arbitration, the rights arbitration provisions of an existing collective agreement will continue to be applicable to the police. This is known as a bridging provision.

D. CONCLUSION

A review of Canadian and New Brunswick legislation in the field of labour relations indicates that labour legislation was initially adopted to improve the working conditions of employees. Subsequent to that, legislation was adopted to provide a structure for collective bargaining in the private sector. Throughout this century bargaining rights have been extended to employees in the public sector. With the extension of bargaining rights to the public sector, governments have been careful to ensure that the disputes between the parties do not adversely affect essential public services. It is apparent that the legislature of New Brunswick has been prepared to enact special legislation designed to meet the special problems of particular employees in the workplace.

PART 2 FUNDAMENTAL ISSUES RELATING TO MUNICIPAL LABOUR RELATIONS

I. DISTINCTION BETWEEN PUBLIC AND PRIVATE SECTOR BARGAINING

It is the Commission's opinion that while there are similarities between public and private sector labour relations there are also important differences that must be recognized. The fundamental difference between public and private sector negotiations is the impact of "political" pressures in public sector bargaining as opposed to "economic" pressures in private sector bargaining.

In the public sector the employer provides services deemed appropriate for delivery to the public and relies on the public purse to provide the necessary revenues. The public sector employer has an assured source of revenue which is not contingent on the provision of services to the public. In contrast, in the private sector the employer must generate the necessary revenue to stay in business by selling goods and services and managing the enterprise efficiently.

In the public sector, the employer does not operate on a profit from service basis. Rather, the employer provides services deemed appropriate for delivery to the public and relies on its power to generate revenues by levying various taxes. However, the ability of elected officials to deliver services at a reasonable cost enhances the probability of their being re-elected.

In public sector bargaining the parties seek to influence the public's perception of the issues in dispute by focusing attention on aspects of their position which they believe will enhance public support for them. Acceptability of position plays a greater role in public sector bargaining than economics. This is not to say that the ability of elected officials to deliver services at a reasonable cost does not enhance their opportunity for re-election. However, elected officials and employees are often much more concerned about the political repercussions of a strike or lock-out than the economic repercussions.

The public's perception of the issues in dispute has a substantial impact on the resolution of bargaining disputes in the public sector.

II. DISTINCTION BETWEEN PROVINCIAL AND MUNICIPAL BARGAINING

One of the primary distinctions between provincial bargaining and municipal bargaining is the fact that the legislature is sovereign. It can enact legislation which impacts directly on the bargaining relationship between the parties. The legislature enacts the legislation providing the framework for collective bargaining in the public sector and also has the power to enact legislation to resolve a bargaining impasse between the parties. For example, in New Brunswick the legislature adopted legislation ordering non-teaching employees back to work and providing for the resolution of the dispute by arbitration.[1] It is clear that the legislature's authority to resolve an impasse by enacting legislation colours the bargaining relationship between the provincial government and its employees. At the same time it is recognized that if the legislature misused its power to resolve disputes it could lead to a deterioration of labour relations within the provincial public service.

It is also important to note that the province's negotiating position is enhanced by the fact that it can make promises to amend labour legislation or employment standards legislation. The municipal employer, however, is restricted to acting within the statutory provisions enacted by the province.

Another important distinction between provincial bargaining and municipal bargaining is the fact that in provincial bargaining the ultimate authority to resolve an impasse rests with cabinet. While unions can lobby M.L.A.'s concerning negotiations at the bargaining table, M.L.A.'s have no direct vote on the collective agreement. This is

[1] Bill 18, *An Act to Ensure Resumption and Continuation of Certain Non Teaching Services in the Public Service* (1982).

to be contrasted with municipal bargaining where one or more municipal councillors may sit at the bargaining table and all municipal councillors have an opportunity to vote on the acceptance or rejection of the collective agreement negotiated for municipal employees. The Commission is also of the opinion that cabinet members are not subject to the same kind of lobbying as municipal councillors. Because of their close proximity to the electorate and the fact that they have more direct control over the collective agreement being negotiated, the lobbying of municipal councillors is more intense and personal.

Another major distinction between provincial bargaining and municipal bargaining is the fact that the province has labour relations experts on staff. These individuals are well trained and experienced. They are also familiar with the intricacies and needs of the employer and trends in collective bargaining. It is important to note that the province's labour relations experts also assist in the administration of the collective agreements which they negotiate. Most municipalities do not have trained labour relations experts on staff and many cannot afford to obtain professional services. Often the negotiation and administration of collective agreements is handled by municipal councillors who have neither the expertise nor the time to establish good labour relations.

It is the Commission's opinion that the direct participation of municipal councillors in the labour relations process and the absence of trained and experienced labour relations staff has unquestionably inhibited the ability of municipalities to respond to the array of bargaining tactics that unions have utilized with considerable success. These tactics include lobbying of municipal councillors and senior administrative staff, appeals for citizen support through media campaigns, picketing and hand billing. Unions have become very adept at marshalling public opinion. Many municipalities have been unable to deal effectively with union campaigns for public support and as a result they have

often compromised long-term economic objectives and labour relations goals for short-term labour relations peace.

The Commission is of the opinion that the framework for collective bargaining in the municipal sector must be designed to respond to the political pressures which are brought to bear on the parties during their disputes. Political pressure is an important aspect of municipal bargaining.

III. THE RIGHT TO STRIKE AND LOCK-OUT

Parliamentarians and legislators have been debating the merits of the right to strike for centuries. In the age of laissez-faire economics in the 18th and 19th centuries the English Parliament passed the *Combination Acts* of 1799, 1800 and 1825.[1] In the *Combination Act* of 1799 parliament acted to penalize all combinations. In the *Combination Act* of 1800 parliament specifically declared to be illegal combinations and agreements that related to wages, hours of work and conditions of employment. This was rectified by the *Combination Act* of 1825 so that a trade union was only liable for charges of criminal conspiracy if the union was involved in a dispute other than one designed to improve wages or reduce hours of work. The 1825 statute therefore permitted employees to meet with their employer and bargain over wages and hours of work. To this extent collective bargaining was recognized. The *Combination Amendment Act* of 1859 permitted some forms of peaceful picketing. The *Master and Servant Act* of 1867 protected an employee from criminal prosecution for breach of his contract of employment. The *Trade Union Act* of 1871 declared that although a trade union's objectives might be in restraint of trade, union members were not libel for prosecution for criminal conspiracy. It is clear that although the right to strike was restricted for many years that over the course of the last century the restrictions on the right to strike have been considerably relaxed.

---

[1] George Adams, Canadian Labour Law (Aurora: Canada Law Book Inc., 1985) p. 3.

In this century the union movement has been freed from the threat of criminal penalties designed to prevent collective action for the purpose of achieving a collective agreement. Indeed, the right to strike is now protected by labour legislation which prevents an employer from discharging or otherwise disciplining an employee simply for participating in a lawful strike.

The Commission is of the opinion that it is now accepted that employees have a legitimate interest in acting collectively to better their terms and conditions of employment. Political, economic and social attitudes have changed considerably since the English Parliament adopted the first *Combination Act* in 1799. The issue today is not whether employees should have the right to strike but how those rights can be exercised.

The definition of a "strike" is not uniform throughout Canada. New Brunswick has a very broad definition of strike. The New Brunswick *Industrial Relations Act* defines a strike in section 1 as follows:

> "Strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow down or other concerted activity on the part of employees designed to restrict or limit output, but no Act or thing required by the provisions of a collective agreement for the safety or health of employees shall be deemed to be an activity intended to restrict or limit output; "to strike" has a corresponding meaning;

In contrast to the New Brunswick definition of strike some provinces have adopted a much narrower definition which defines a strike as that activity which is designed to compel an employer to accept terms and conditions of employment.[1] The definition would clearly not be broad enough to encompass collective activity designed to achieve political objectives such as the collective refusal to work in order to participate in a day

[1] Alberta *Labour Relations Act* s. 1, Alberta *Police Officers Collective Bargaining Act* s. 1, Manitoba *Labour Relations Act* s. 1, Manitoba *Act Respecting the Arbitration of Labour Disputes Affecting Municipal Fire Departments* s. 1, Nova Scotia *Trade Union Act* s. 1, Nova Scotia *Civil Service Act* s. 1, Nova Scotia *Teacher's Collective Bargaining Act* s. 1.

of protest. The lock-out is the employer's economic weapon of last resort. Like the strike it can be used by the employer to exert economic pressure on its employees to effect a settlement.

In the *Industrial Relations Act* a "lock-out" is defined as follows:

> "lock-out" includes the closing of a place of employment, a suspension of work, a substantial alteration in the normal pattern of operation in a place of employment, or a refusal by an employer to continue to employ a number of his employees, done with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union, the council of trade unions or the employees;[1]

It must be noted that the *Public Service Labour Relations Act* does not have any provisions whereby the employer may lock-out its employees. This would appear to be one of the unique features of the *Public Service Labour Relations Act* and the *Public Service Staff Relations Act* on which it is modeled.

It is clear that municipalities represent a third level of government. Municipalities have a mandate to govern the citizens within their jurisdictions. Although many of the services which municipalities provide to their citizens can be considered to be essential services, municipalities in New Brunswick are in fact only required by legislation to provide police services. With the exception of police services municipalities have been left free to determine what services shall be provided. Even in the case of police services municipalities have been left free to determine the manner and extent to which those services will be provided.

The *Industrial Relations Act*, which presently governs municipal employers, makes the lock-out available to municipal employers. Over the years several municipalities in New Brunswick have used the lock-out as a means of applying economic pressure

---

[1] *Industrial Relations Act* s. 1

during their negotiations. The Commission concludes from this that New Brunswick municipalities have satisfied themselves that they can engage in a lock-out and at the same time provide essential municipal services. However, in a few cases New Brunswick municipalities have not discharged their obligations under the Act. This was the case with the decision by the City of Saint John to lock-out its police officers in 1985 without taking the necessary steps to ensure the delivery of adequate police services to the citizens of the City of Saint John. This lock-out was found to be illegal by the New Brunswick Industrial Relations Board.[1]

It is the Commission's opinion that the sanctions available to the parties should be balanced. As well, it is the Commission's opinion that an employer ought not to be left without any kind of a remedy when its employees engage in rotating strikes or other disruptive action. The lock-out is an important bargaining tool that should not be denied to the employer unless the "health, safety or security of the public" cannot be protected. Indeed, the *Public Service Staff Relations Act*, which does not provide the employer with the right to lock-out has been criticized for not providing this right to the employer. The Finkelman Report stated the following:

> It is unlikely that a public service employer would lock-out its employees with a view to compelling them to agree to terms and conditions of employment. However, when employees engage in a rotating strike or an action which does not involve a complete cessation to work, the employer may well regard a retaliatory lock-out of the employees in the bargaining unit to be an effective weapon to minimize the impact of such a strike. There does not appear to be any justification for depriving the employer of this weapon.[2]

The Commission shares the opinion expressed in the Finkelman Report. However, the municipality must be required to ensure that the public will continue to receive essential public services.

---

[1] *Saint John Policemen's Protective Association, Local 61, Canadian Union of Public Employees v The City of Saint John* (New Brunswick Industrial Relations Board Order, IRB 8-1-85, June 6, 1985), (1986), N.B.R. (2nd) 309.

[2] J. Finkelman, Q.C., Employer-Employee Relations in the Public Service of Canada - Proposals for Legislative Change Part I (Ottawa: Information Canada, 1974) pp.154-155.

IV. TRENDS IN THE TERMS AND CONDITIONS OF EMPLOYMENT

The initial thrust by the labour movement in collective bargaining was to improve the terms and conditions of employment. Initially, demands were for increases in wages, fringe benefits and better working conditions. Gradually, the scope of the demands made by the labour movement expanded. The unions demanded better union security clauses and pension rights. Labour is now demanding a greater role in those matters which were once thought of as management prerogatives. Today, the union movement is seeking to participate in the decision-making process as it affects the members of the bargaining unit with respect to the terms and conditions set forth in the collective agreement. In doing so the labour movement is receiving stiff opposition from employers. In many cases as concessions have been gained from employers by the union movement the legislature has provided similar benefits to non-unionized employees in the form of employment standards legislation. An example is the *Employment Standards Act* which established new rights for employees and enshrined and expanded some common law rights. At the same time, the labour movement is continuing to make demands for improvements in the labour legislation in the province.

Compensation packages available to municipal employees are now equal to or greater than the compensation packages available to employees in the private sector.[1] Indeed, in some cases municipal employees have better compensation packages available to them than provincial government employees in New Brunswick.[2]

The Commission is of the opinion that public sector compensation packages should not be in excess of those available in the private sector. In the private sector, market forces operate to establish viable realistic compensation packages. Good economic plan-

---

[1] Peter E. Larsen and Robert DuBroy, Compensation in the Public and Private Sectors, Report 13-86 (Ottawa: Conference Board of Canada, 1986).
[2] Ibid..

ning dictates that public sector compensation packages should not exceed those available in the private sector. The result of an imbalance would be a misallocation of resources between the private and public sectors.

Unions have achieved considerable success in restricting the prerogatives of the municipal employer and in obtaining the right to participate in decisions which were once thought of as being solely within the prerogative of management. In some cases the restrictions on the employer's prerogatives have been brought about simply by strengthening union security clauses; in other cases, by strengthening clauses dealing with promotions. It has been suggested that in some cases the result of these advances by the union is an awkward and inefficient administrative structure. Indeed, it is claimed by some that the *Police Act* was enacted to, in part, restore some management prerogatives to municipal police departments. The Commission is of the opinion that the issue of management rights is best resolved at the bargaining table. It is an important issue for both labour and management and one which the Commission believes the parties should resolve themselves. Legislation should not be enacted solely for the purpose of relieving municipalities from the difficulties they find themselves in as a result of poor bargaining. Legislative action of this sort undermines the integrity of the bargaining process and relieves the municipalities from discharging their obligations in a responsible manner. It is a poor precedent for the future.

The Commission was concerned during the public hearings to hear union submissions that municipal employers should not be asking for what are commonly termed "take aways". Bargaining is a two way street. Indeed, there is nothing so unpredictable as the economy. Although public sector workers are to a certain extent insulated from the forces of the market they must also realize that they are not beyond economic forces. Economic forces have a profound impact on federal, provincial and municipal budgets.

In poor economic conditions governments face increasing demands for social expenditures while their tax base is decreasing. Public sector employees cannot expect to be unaffected by these economic conditions. Indeed, even in the area of management rights employees should not expect a municipal employer to continue to operate on the basis of a concession which it has found to be unworkable. A good collective agreement must recognize changing economic, political and social trends and provide a workable structure in which the parties may accomplish their objectives.

A review of labour relations indicates that the major concerns of the parties has been, and will be for some time, the terms and conditions of employment relating to wages, fringe benefits, security of employment and management rights. Over time these issues have become more complex. Given the rapid pace of change in our society and the complexity of the issues facing the parties it is important that the framework for collective bargaining be as flexible as possible. A flexible system will allow the parties to respond to the challenges facing them with greater success.

V. POLICE

The Royal Charter establishing the City of Saint John in 1785 provided that the citizens of the city could elect constables to ensure the public safety. Constables were elected by ward within the city. Subsequent to that, legislation was passed to establish a night watch to supplement the elected constables. Later, legislation was passed establishing a night watch and day police.[1] This was the first time that the term police had been used to describe those responsible for ensuring the public safety. In 1848 legislation was passed providing for the establishment of a police force in the Parish of Portland.[2] This

---

[1] 11 Victoria, Chapter 13.
[2] 11 Victoria, Chapter 12.

Act provided that the Lieutenant Governor could appoint a police magistrate who was vested with the authority to appoint up to fifteen constables for preserving the peace and preventing felonies. In 1849 similar legislation was enacted for the City of Saint John.[1] It was not until 1856 that the position of chief of policewas created.[2] The first chiefs of police were appointed by the Lieutenant-Governor in Council. Pursuant to the legislation the chief of police was given the authority to appoint police officers as required by the city. In 1913, the power to appoint the chief of police was vested in the Saint John City council.[3]

Saint John has always been New Brunwick's major urban center. It is significant to note that the first police constables in Saint John were not subject to direction in carrying out their duties by either a magistrate or a chief of police. This was because constables held a public office and were expected to exercise their individual discretion in performing their duty of enforcing the law.

Federal, provincial and municipal governments now devote considerable resources to providing police protection in New Brunswick. The *Annual Report of the New Brunswick Police Commission (1985-1986)* states the following:

> New Brunswick's population of 720,000 is policed by twenty-nine separate police forces (R.C.M.P. in its provincial role plus twelve municipal contracts, the New Brunswick Highway Patrol in its province-wide traffic role and twenty-seven individual municipal forces ranging in size from three to over one-hundred ninety). The police budgets for these police forces exceed sixty-six million dollars in 1985-1986.[4]

The first Saint John City constables were not employees. They were public officials by virtue of the fact that they held an elected office. They were also required to exercise independent discretion in performing their duties. Today, although police of-

---

1 12 Victoria, Chapter 68.
2 19 Victoria, Chapter 52.
3 3 George V, Chapter 62.
4 New Brunswick Police Commission Annual Report, 1985-1986, (Fredericton, New Brunswick: Province of New Brunswick, 1986).

ficers are appointed to their position by the municipal employer they are still required to exercise independent discretion in performing their duties. A police officer is the only official in our society who can lawfully deprive a citizen of his liberty without a hearing. In doing so he is required to act on the basis of his true and independent judgment alone. The unique status of a police officer is recognized today in the *Industrial Relations Act* which deems police officers to be employees for purposes of the *Industrial Relations Act* notwithstanding that at common law they are not regarded as employees.

In 1977 New Brunswick adopted the *Police Act*. Its stated purpose was to promote "the efficiency of police services and the development of effective policing within the province".[1] In 1986 some important provisions in the *Police Act* were proclaimed which had a significant impact on police collective bargaining.

Traditionally, New Brunswick municipalities were responsible for the establishment and direction of municipal police forces. With the adoption of the *Police Act* in 1977 the province took the first steps towards the establishment of uniform and standard police services throughout the province. By this act the province removed from the municipalities much of the control which they had formerly exercised over police services. In 1986 provisions of the *Police Act* came into effect whereby the province assumed more responsibility from the municipalities, defining the extent of their management prerogatives in the area of collective bargaining. New Brunswick municipalities were left with the responsibility for negotiating their collective agreements on those issues not excluded from bargaining and raising the revenue to pay for policing services.

Police officers expressed particular concern about the 1986 amendments. The general feeling was that there was a great deal of ambiguity as to what was negotiable

[1] *The Police Act* 1977, s.20.

and what was not, as well as uncertainty as to what would happen to those gains which had been negotiated over the years at the bargaining table. There is still some doubt as to what is excluded from the bargaining process.[1]

Although police officers hold a public office and cannot be considered to be simply employees of a municipal corporation, and discharge many duties which are considered to be essential to the safety and security of the public, a bona fide reason does not exist to exclude police officers from the benefits of New Brunswick's labour legislation. The best method of determining the terms and conditions of employment is by negotiation by the parties themselves.

In this day and age the terms and conditions of employment are not restricted to monetary items. Negotiations also include the manner in which decisions are made concerning the work force. The Commission recognizes that there are many (possibly with good reason) who believe that New Brunswick municipalities can no longer effectively manage their police forces because of some of the restrictive clauses which have been inserted in collective agreements at the request of the union. However, if this is in fact the case, the problem should be rectified by the municipalities at the bargaining table. Although the legislation that has been introduced may correct the perceived problem in the short term, a long term solution is necessary. This problem should be resolved at the negotiating table.

The Commission has observed that some chiefs of police, particularly those with an R.C.M.P. background, and others, believe that police departments must be operated in a para-military fashion with a rigid chain of command. This is contrary to the manner in

[1] *The Board of Police Commissioners for the City of Saint John and the City of Saint John v the Saint John Policeman's Association, Local 61, Canadian Union of Public Employees; the City of Moncton v Canadian Union of Public Employees, Local No. 490, Moncton Police Association*; decision by Stevenson J., N.B.Q.B. dated March 16, 1987.

which police departments evolved in New Brunswick. However, assuming that it is necessary for police departments to have a clear chain of command, in order to operate effectively, it does not also follow that a flexible structure for decision making with employee participation would not be appropriate to meet the labour relations goals of the parties. The Commission is of the opinion that a distinction must be drawn between the operational needs of a police department and the labour relations objectives of the parties. If that distinction can be made then the appropriate structures can be developed to accommodate the respective needs of the parties.

An issue which has been the subject of considerable debate recently is whether or not police officers should belong to affiliated unions. Those in favor of affiliation argue that police officers should be able to take full advantage of the union movement including affiliation with major unions. Those opposed to the idea argue that police officers who are members of an affiliated union are not free to exercise their duties in respect of other members of the affiliated union because of their mutual membership in the same union. The Commission has found no evidence to support the latter view. Indeed, a study by R. L. Jackson entitled *Canadian Police Labour Relations in the '80s: New Environmental Concerns* indicates that the police see themselves as a separate identifiable group.[1] Although they may be members of an affiliated union they continue to see themselves as occupying a unique status as police officers with a public duty to perform.

The Commission is of the opinion that police officers have a natural inclination to view themselves as police officers first and union members second. In addition, the fact that they have taken an oath to maintain the law has no doubt resulted in police officers performing their duties when required to do so, notwithstanding the fact that they have been required to exercise their powers against other members of the affiliated union.

---

[1] R. L. Jackson, "Canadian Police Labour Relations in the '80s: New Environmental Concerns" Canadian Police College Journal, No. 2, 1986.

The Commission is, therefore, of the opinion that there is no reason why police officers should be legally restricted from joining affiliated unions.

The parties have acknowledged that even during a strike or a lock-out police protection must be provided to the citizens. Notwithstanding the agreement that police protection should be provided, the parties have not resolved some fundamental issues concerning the provision of police services during a strike. The two major issues are whether or not the police should continue to be visible during a strike or lock-out and who should direct the police force during a strike or lock-out.

Policing involves the prevention of crime and the apprehension of law breakers. In order to effectively prevent crime it is the general view that the police must be visible to the public. This not only deters crime but provides the public with a sense of well-being and safety. The Commission is of the opinion that during a strike the police must continue to be visible. It is not sufficient for the police simply to be on call to respond to crime which may endanger the public safety. Although a police presence during a strike may prevent offences which do not endanger the public safety, this is not a sufficient reason to relieve police officers from providing a visible presence during a strike.

It is the municipality that is responsible for providing policing services to the community. It is accountable to the citizens for their safety. In the view of the Commission it would not be appropriate for the right to direct the police department to be removed from a municipality during a strike or lock-out. It would be neither just nor fair to hold municipalities accountable for the actions of their employees if they are not able to exercise the authority to direct them. The Commission is of the opinion that it would be improper to allow the union to direct the police department in the event of a strike. The direction of the police department should rest with the police chief at all times.

It is the Commission's opinion that in order to maintain a minimum standard of police protection during a strike, smaller forces will have to maintain a higher percentage of members on duty than larger forces. Larger forces have a greater number of specially skilled officers (ballistic experts, breathalizer technicians, victim assistance officers, toxicologists, and finger print experts, etc.) who are important if offenders are to be apprehended and prosecuted. However, many of these experts are not necessary to protect the "health, safety or security of the public" in the context of a strike. This would normally mean that during a strike a smaller percentage of larger forces is necessary in order to ensure that the public is adequately protected. It is apparent and has been acknowledged by the parties that large and small forces cannot be dealt with in the same way in determining the ratio necessary to provide essential services during the term of a strike.[1]

VI. FIRE

In 1785 the City of Saint John enacted a by-law for the prevention of fires in the city. The following year the city authorized the purchase of two fire engines and proceeded with plans to establish two companies of firefighters. In 1787 additional fire engines were purchased and wells were dug in order to secure the city from the dangers of fires.[2]

With increasing urbanization other municipalities organized fire departments. In some cases the municipalities established professional fire fighting departments; in other cases, the early municipalities relied on volunteer firefighters. Today there are 152 fire departments in New Brunswick. These fire departments employ approximately 500

---

[1] Recommendations of the Police Bargaining Committee, January 1981; Minutes, General Industry Panel (discussions related to municipal matters and essential services) 1984 and 1985.

[2] Canada's First City Saint John (Saint John, New Brunswick: Lingley Printing Co. Ltd., 1962), p. 81, 84 and 125.

permanent full-time firefighters who are covered by 14 collective agreements. New Brunswick also has approximately 3,500 volunteer firefighters. Some New Brunswick municipalities have both permanent and volunteer firefighters.

Fire departments were initially established in order to prevent the spread of fire throughout urban centres. Since that time fire departments have become engaged in a number of other activities. For instance, fire departments now engage in regular fire inspections, act as rescue squads and assist other emergency personnel as required. However, the reason for the existence of a fire department continues to remain the fighting of fires. It is interesting to note, however, that a Saint John fire department report indicates that of 1,156 calls in a six month period less than half of those were related to actual fires. The others were false alarms, malfunctions, requests to assist in the transportation of individuals to hospital, and other non-fire related activities.

There can be no doubt that fire departments play an important role in ensuring the safety and security of the public. While they are responsible for preventing the spread of fire in an urban community, they can also provide many other useful services. It is significant that in a questionnaire distributed by the Commission to all candidates for municipal office in 1986, that the responses indicated that fire fighting ranked as the number one essential service in their communities. It should be noted that a large number of replies came from areas where there was only limited fire protection or volunteer services.

When the *Industrial Relations Act* was being drafted the International Firefighters Association had a provision in its constitution which prohibited firefighters from striking. The self-imposed restriction on the right to strike and the absence of the right to proceed to binding arbitration left the firefighters in a quandary. As a result representations were made to the government to set out provisions in the *Industrial Relations Act* whereby the firefighters had the right to proceed to binding arbitration. It appears that

the government accepted the submissions made by the firefighters and submitted to their request.[1] By acceding to the firefighters' request, the question as to whether firefighting services are essential was never dealt with.

Since the enactment of the *Industrial Relations Act* the constitution of the International Firefighters Association has been amended to allow their members to engage in strike action.[2] As well, the constitution of the Canadian Union of Public Employees which represents some municipal firefighters allows firefighters to strike. Therefore the Commission found it necessary for this and other reasons to review the legislative requirement for compulsory arbitration for firefighters.

Since the enactment of the *Industrial Relations Act* the compensation packages for firefighters in New Brunswick have paralleled those available to the police. This is not only true in New Brunswick. It is a North American phenomenon. The Commission accepts the proposition that if arbitration is to be used successfully there must be wage comparisons between the group using arbitration and others who bargain with the right to utilize the strike weapon. However, it is the Commission's opinion that wage comparisons must be made on a realistic basis. Economic conditions and job skills change over time and it is necessary for arbitrators to respond to those changes.

It is of importance that arbitrators avoid what can commonly be termed as "parasitic wage comparisons". It is of interest to read the comments of George W. Adams:

> Parasitic wage criteria are criteria that derive their sustenance from another bargaining process. In relying on such criteria, care must always be taken not to use parasitic criteria that will in time undermine the very foundations

---

[1] Report of Select Committee of the Legislature Established to Study the Labour Relations Act (Fredericton: Province of New Brunswick, 1967), p. 33-34.
[2] Letter from International Firefighters Association dated January 2, 1987.

> of the adjudicative process. The real problem in police and fire wage determinations generally is their potential for devouring the very basis of adjudication. In Ontario police and fire arbitrations, there is increasing evidence that the system is doing just this. All of the critical comparisons are centered on the experience of a few key bargaining situations and they lack stable outside comparisons. The entire system, therefore, rests on a foundation of shifting sand.
>
> Where employees make claims by way of free collective bargaining, other interest groups in need of public funds can at least indirectly participate through the general budgetary process and lobbying. The employer has to balance these conflicting claims in cushioning his position both at the bargaining table and in the political arena. Employees, therefore, have no absolute right to have their claims met and are confronted with the employer's dilemma of a limited pool of money on which many demands are being made in addition to those of collective bargaining.
>
> On the other hand, none of the other interest groups have any standing before an interest arbitrator and arbitration awards are sometimes made, without regard for the public employer's ability to pay.[1]

It is noteworthy that many municipalities which have engaged in compulsory arbitration are now complaining about the results. Mandatory arbitration is much different than consensual arbitration.[2] With consensual arbitration the parties have a choice whether or not to proceed to arbitration. It is the Commission's opinion that with consensual arbitration the terms and conditions of a collective agreement are more likely to be consistent with the realities of the market place.

It is the Commission's opinion that while arbitration has merits it also presents problems which now exist in the case of the firefighters. Arbitration has been used to settle disputes for such a long time that it is now questionable whether or not wages and

[1] George W. Adams, "The Ontario Experience with Interest Arbitration", Industrial Relations, Vol. 36, No. 1.
[2] See report in the Daily Gleaner re arbitration between the City of Fredericton and the International Association of Firefighters, Local 1053 dated May 15, 1987.

benefits for firefighters have exceeded realistic levels. Notwithstanding that firefighting is a dangerous occupation over the past decade there have been a minimum of 150 applications for each job opening in the City of Fredericton Fire Department. The Commission therefore recommends they be given the right to use economic sanctions to resolve their bargaining disputes.

While firefighters provide services which can be considered to be essential there is no justification for treating firefighters differently than other employee groups which also provide essential services. The Commission therefore recommends that the legislation be amended to place firefighters in the same position as other employees providing essential services. They should be entitled to take strike action provided arrangements can be made to ensure that the safety and security of the public is protected.

VII. CONCLUSION

It is clear that there are important distinctions between public sector and private sector bargaining. The legislature has recognized these differences by enacting the *Public Service Labour Relations Act*. As well the legislature has recognized that there are differences between various groups within the private sector. For instance, the legislature has enacted special provisions regulating mega projects and the fishing industry in New Brunswick. (See sections 144 to 158 of the *Industrial Relations Act* and the *Fisheries Bargaining Act*.) The Commission is of the view that the distinction between public sector and private sector bargaining must be recognized. This should be done either by enacting special provisions in the *Industrial Relations Act* or enacting a statute entitled the "Municipal Services Employee Relations Act" setting out legislative provisions designed specifically to accommodate the important differences in employer-

employee relations in the municipal sector. If the Industrial Relations Act[1] is used to regulate labour relations in the municipal sector the Act should be amended to establish a municipal division of the Board with employer and employee representatives on the Board from the municipal sector. (Hereafter, all references to "Board" in this report should be read in this context.)

---

[1] The *Industrial Relations Act*, s.117 allows for the establishment of other divisions of the Board as may from time to time be required.

PART 3 THE ORGANIZATION OF THE PARTIES FOR PURPOSES OF COLLECTIVE BARGAINING

I. APPROPRIATE EMPLOYEE UNIT

A. CERTIFICATION

The Commission found that most municipal employees who would be entitled to proceed with an application for certification have done so. Consequently there were very few submissions concerning the certification process. Notwithstanding that, the Commission thinks that it is appropriate to make a few comments concerning the process.

The labour legislation in New Brunswick permits employees to join together to take collective action to negotiate with their employer. This is a fundamental principle of our labour legislation. The labour legislation sets out the framework and procedures with which the employees must comply in order to take collective action. Basically, this involves making an application to a Board and establishing that the employees constitute a unit appropriate for collective bargaining and that a majority of the employees in the unit support the application. Once certified the unit becomes the exclusive bargaining agent for all employees falling within the bargaining unit. Once certified the parties must commence bargaining until a collective agreement is reached.

Each party is entitled to pursue its legitimate interests during the course of bargaining. However, neither party is permitted to engage in unfair labour practices. For instance, an employer is not permitted to engage in any activities which would undermine the authority of the union to bargain on behalf of its membership.

It is generally conceded that the best collective agreement between the parties is that which the parties fashion themselves. The assumed strength to this approach is that the union and the employer are more likely to accept an employment relationship which they themselves create than one which is imposed on them either by an arbitrator or by

legislation. Indeed, it is thought that the process of negotiation is the best method of achieving accommodation and compromise at the bargaining table. It is the parties which best know their economic and social objectives. Each party is entitled to bargain hard for an agreement which it believes is acceptable.

The right to engage in collective bargaining does not give either party the right to achieve all or any of the terms and conditions of employment which it desires. It is simply an opportunity for each party to try and achieve its objectives. Economic, political and social realities may dictate quite a different result in any particular situation.

The parties may resort to economic sanctions in the event they are unable to resolve their differences through negotiation at the bargaining table. It is generally conceded that in the private sector this is the most appropriate method for resolving the differences between the parties since they themselves bear the brunt of the economic sanctions. In the public sector, however, it is acknowledged that the public employer generally provides many services which can be classed as essential. In the event these services are withdrawn the "health, safety or security of the public" can be endangered. The Commission is therefore of the opinion that some measures must be adopted for the protection of the public in the event of a strike or a lock-out.

B. SUPERVISORY/NON-SUPERVISORY UNITS

The legislature has adopted various forms of legislation which extend rights to municipal workers. The *Municipalities Act* for instance provides in section 74 that the "senior appointed officers" of a municipality cannot be dismissed except for cause by the affirmative vote of at least two-thirds of all the members of the municipal council. By enacting this legislation the legislature has conferred a unique benefit on "senior appointed officers" of municipalities which other public sector employees do not have. The effect is to afford senior appointed officers a substantial degree of job protection.

Similarly, most collective agreements provide municipal workers with substantial benefits including job protection.

There are some municipal workers who exercise supervisory functions who are excluded from the benefits conferred by the *Industrial Relations Act* and the *Municipalities Act* who have no real job security. The Commission is of the opinion that this group of municipal workers should be entitled to take collective action in order to improve their terms and conditions of employment.

The prime function of management is to make decisions. Many of the municipal workers excluded from the protection of the *Industrial Relations Act* and the *Municipalities Act* are not managers in that they do not make true management decisions. Rather, they are primarily engaged in supervising municipal operations and reporting their findings to senior officials who exercise the power to make decisions on behalf of the municipality. It is the Commission's opinion that these municipal workers should be entitled to form supervisory units in order to further their economic interests. It is recognized that this may require changes in the definition of "employee" under the *Industrial Relations Act*.

The legislature has accepted the principle of supervisory units in the *Public Service Labour Relations Act*. Section 24(5) of the Act states:

> During the initial certification period, a unit of employees may be determined by the Board as a unit appropriate for collective bargaining only if that unit is comprised of... (c) all of the employees in an occupational group whose duties include the supervision of other employees in that occupational group.

The Commission is of the opinion that if supervisory units can be justified in the provincial public service they can also be justified in the municipal sector.

It should be noted that there is one supervisory unit under Part 1 of the *Public Service Labour Relations Act*. As well, under Part 2 of the Act there is a supervisory

unit in the scientific and professional category for District School Superintendents, one for Administrative Service Officers I-IV and one for Maintenance Supervisor and School Accountants I-III. Under Part 4 of the Act there is a separate unit for Supervisors and Shift Supervisors in the technical category, Supervisors in the administrative category, and a supervisory group in the occupational category.

The Commission is of the opinion that legislative reforms to permit the creation of supervisory units within the municipal sector will result in the creation of additional bargaining units. It is expected that the majority of the members of the new supervisory units will be first time union members although supervisors may join who are already members of a bargaining unit. This should not disrupt municipal labour relations.

There are some departments within municipalities in which very few individuals have been excluded on the basis that they perform management functions. The Commission believes that by introducing supervisory units the balance between senior management, supervisors and workers could be restored. The extension of bargaining rights to supervisory personnel would achieve this balance without the disruptions that are likely to result from legislation designed to reduce the collective bargaining rights presently enjoyed by members of the present bargaining units. Indeed, the introduction of supervisory units in the police department would resolve some of the problems which have been raised by police chiefs.

The Commission is of the opinion that supervisory and non-supervisory bargaining units should not be affiliated with the same union. A union owes a duty of fair representation to its members. There are instances when a dispute may arise between an individual in a non-supervisory bargaining unit and an individual in a supervisory bargaining unit. It is the Commission's view that it would be impossible for a union to discharge its duty of fair representation if two employees belonged to the same union.

Over time, supervisory units should develop their own affiliations. They would then be able to pool resources and develop strategies.

C. COMPOSITE BARGAINING UNITS

In 1985 section 13(3) of the *Industrial Relations Act* was amended to permit firefighters who belong to composite bargaining units to make an application to the Industrial Relations Board to form their own unit.[1] This amendment was necessary because the Minister would not refer a bargaining impasse to arbitration when the firefighters belonged to a composite bargaining unit. Without compulsory arbitration this amendment would not have been necessary. Although most police officers in the province do not belong to composite bargaining units the Commission recommends that the legislation be amended to enable police officers in composite bargaining units to establish their own bargaining unit upon application to the Board.[2]

The Commission has recommended the adoption of designation in another part of this report. It is anticipated that designation will be at much higher levels for some employee groups than others. In view of this some occupational groups will want to establish their own bargaining units. This may be the case where an occupational group believes that its best interests will be better served by pursuing the strike/lock-out route as another occupational group within the composite bargaining unit has been made sub-

---

[1] Section 13(3) of the Industrial Relations Act states "Where the Board has certified a trade union as the bargaining agent for a unit of employees that comprises members of a fire department and other employees and where that bargaining agent makes an application to the Board for a separate certification for a unit of employees comprising only those members of a fire department, the members of the fire department shall be deemed to be a unit appropriate for collective bargaining."

[2] At the present time, Grand Bay and Sackville are the only municipalities with composite bargaining units that are composed of police and other occupational categories.

ject to high designation levels therefore making a strike by it ineffective, and result in its members concluding that their best interests would be better served by proceeding to arbitration. The bargaining agent for a composite bargaining unit may make an application to the Board for a separate certification for a unit of employees within the composite bargaining unit at any time.

II. APPROPRIATE EMPLOYER UNIT

During the course of the public hearings it became apparent to the Commission that many New Brunswick municipalities do not have the human and financial resources to conduct effective labour relations with the Canadian Union of Public Employees (C.U.P.E.). Most New Brunswick municipalities do not have senior employees who are trained and experienced in labour relations. Indeed, those individuals who work for municipalities in New Brunswick and are responsible for their labour relations tend to come out of the personnel management field.

It is the Commission's opinion that there is a significant difference between managing personnel and conducting effective labour relations. In order to conduct effective labour relations it is necessary to have an understanding of the dynamics of the labour movement and bargaining tactics. In addition, New Brunswick municipalities often do not have the financial resources to obtain sound labour relations advice. This is particularly true of the smaller New Brunswick municipalities. Expert advice is expensive.

It also became obvious during the course of the public hearings that many municipal councils do not understand the fundamental principles of labour relations. This is not surprising since labour relations is a very specialized field and one would not expect most councillors to have gained expertise in the area. However, it is important for municipal councils to have access to labour relations advice at reasonable cost. Unfortunately most municipalities do not have a senior labour relations person on staff in

whom they have confidence. The reason appears to be that most municipalities place a low priority on labour relations and either cannot or do not wish to commit adequate human and financial resources to labour relations. It is the Commission's view that New Brunswick municipalities should give higher priority to their labour relations.

C.U.P.E. by contrast is a large well-financed national union. It is tough and aggressive. Its negotiators receive expert training in labour relations and bargaining tactics. They also conduct labour relations on a full-time basis and are able to gain considerable experience.[1] In addition, C.U.P.E. is well organized on a provincial basis and is able to keep itself appraised of current trends and developments in all regions of the province. Its organizational structure, financial resources and trained staff make C.U.P.E. a formidable adversary at the bargaining table. This fact has no doubt been appreciated by New Brunswick municipalities, however, they have failed to respond to the challenge.

C.U.P.E.'s province-wide organizational structure allows it to bargain not only on a municipal basis but also on a provincial basis. It is the Commission's opinion that C.U.P.E. does in fact determine its bargaining priorities on a provincial basis. This allows C.U.P.E. to establish precedents in various municipalities which it then uses to set trends across the entire province.

To date, New Brunswick municipalities have been unable to organize themselves in a manner which allows them to effectively respond to C.U.P.E.'s bargaining tactics. It is

[1] The New Brunswick division of the Canadian Union of Public Employees represents twenty thousand workers across the province. (Source: C.U.P.E. brief dated October 9, 1986, p. 1).

acknowledged that New Brunswick municipalities have formed the New Brunswick Provincial-Municipal Council. Although the Provincial-Municipal Council serves as a clearing house for the exchange of information and a forum in which to discuss bargaining strategies, it has not provided a structure in which New Brunswick municipalities can effectively join together to respond to C.U.P.E.'s bargaining tactics. One suggestion that has been made is that the Provincial-Municipal Council could provide a staff of labour relations experts which municipalities could draw on to negotiate and administer their collective agreements.

In the construction industry, employers experienced many of the same problems which now confront New Brunswick municipalities. They had limited expertise in labour relations, limited financial resouces and were fragmented. At the same time they were confronted by large and aggressive unions. In his report, *Southern New Brunswick Construction Industry Industrial Relations*, H.D. Woods stated the following:

> Accreditation was first recommended by Arthurs and Crispo as a means of correcting an imbalance in bargaining power between unions and employers in the construction industry. The reasoning was somewhat as follows: basic to Canadian labour relations legislation is "the assumption that countervailing power in employee-employer relations is a desirable public objective". On the employee side the introduction of certification was designed to strengthen labour's power by protecting the right to unionism unmolested by employers or others and particularly by imposing the obligation on employers to recognize a majority supported union and negotiate with it in good faith with the objective of signing a collective agreement.
>
> ...Accreditation was intended to do for employer associations what certification did for unions, it was supposed to protect the employers collectively by forcing unions to recognize majority employer associations and negotiate with such associations instead of with the individual employers represented by the employer associations, even though these employers were individually certified by the involved union. In other words just as certification transfers

> the sole right to bargain from the individual employee to the certified union, accreditation transfers the right to bargain from the employer to the employers' association.[1]

There are various forms of accreditation. In New Brunswick the model adopted for the construction industry is as follows. An employers' organization may apply to the Board to be the accredited bargaining agent for all employers in a particular geographic area and sector of the industry. The employers' association must satisfy the Industrial Relations Board that the unit is appropriate for collective bargaining and that the application has the support of a majority of the unionized employers in the particular geographic area and sector. All unionized employers in the particular geographic area and sector, whether members of the employers' association or not, are given an opportunity to vote. The employers' association must have the support of the majority of the employers who employ a majority of the employees in the geographic area and sector. If accredited, the employers' association gains the right to bargain on behalf of all the unionized employers in the geographic area and sector, whether or not they are members of the association.

The form of accreditation which the Commission recommends for the municipal sector is modelled after the British Columbia accreditation system which is quite different from that adopted for the New Brunswick construction industry. The Commission recommends a system of voluntary accreditation for the municipal sector. An employers' association would be accredited if the Board were satisfied that all the employers named in the application for accreditation constituted a group appropriate for collective bargaining and all the members of the applicant association supported the application for accreditation. If accredited, the employers' association would only gain

---

[1] H.D. Woods, Report on Southern New Brunswick Construction Industry Industrial Relations (Fredericton: Province of New Brunswick, 1981) pp. 289-291.

the right to bargain on behalf of the members of the association. However, once accredited, membership in the association could only be terminated by making an application to the Board at least one month prior to the date on which the notice to bargain must be given, during the two month period immediately preceding the expiration of the collective agreement.

Although the British Columbia model of accreditation is generally viewed as the weakest form of accreditation in the construction industry because it applies only to members of the employers' association who have voluntarily agreed to join it, the Commission is of the view that this is the most appropriate form of accreditation for municipal government. If accreditation is to work in the municipal sector the decision to join or not to join an employers' association must be the decision of the municipal employer which represents the electorate within the municipality. It is the Commission's opinion that in a system of responsible government with elected officials those officials should not be deprived of their mandate to bargain with their employees unless they have agreed to it. However, if the elected officials determine that it is in the best interest of the municipality to join with other municipal employers and bargain collectively, the legislation should provide a mechanism whereby this goal can be accomplished.

The Commission recommends that legislation be enacted to allow municipalities to join together and be accredited within an employers' bargaining association. In the Commission's opinion municipalities should be permitted to join together on a regional basis or on the basis of their status as cities, towns or villages. Members of the employers' association would be bound by the collective agreements negotiated by the accredited employers' association.

An accredited employers' association assumes full responsibility for bargaining with the employee groups. If a municipality is a member of an employers' association, that

municipality will have to determine the priorities for the association in consultation with other members of the association.

New Brunswick municipalities must focus more attention on the administration of their collective agreements if accreditation is to work successfully. Mechanisms must be established whereby the collective agreements which are negotiated are administered uniformly by the member municipalities. In addition, municipalities must be prepared to devote the necessary human and financial resources to labour relations. This includes giving a higher priority to labour relations, training employees in labour relations and bargaining tactics, and ensuring that municipal employees who are responsible for conducting labour relations have experience in the field. It is important to note that municipalities are labour intensive and that their programs are people oriented. For this reason it is particularly important that New Brunswick municipalities develop good labour relations. Good labour relations should result in a better motivated and more productive work force.

PART 4 THE DEFINITION OF ESSENTIAL SERVICES

There is considerable debate as to what constitutes an essential service. There is even more debate as to how an essential service should be defined. There are various definitions used throughout Canada to define essential services. It is the Commission's opinion that many definitions have been used to accomplish the same objective which is the protection of the public during a strike. In the final analysis it is the boards and tribunals which administer the legislation which determine the scope of the protection afforded to the public. They are a key element in the system.

The Commission is of the opinion that a workable definition is to be found in section 50(1) of the *Public Service Labour Relations Act*. In exercising its responsibilities the Public Service Labour Relations Board is required to ensure that the "health, safety or security of the public" is protected. Section 91(6) of the *Industrial Relations Act* governing police strikes requires that the Minister ensure "adequate provision for the protection of the public safety". It is the Commission's opinion that the health and security of the public must also be protected, not only its safety.

The Commission does not accept the recommendations of the Police Bargaining Committee wherein an essential service was defined as that which if not performed would endanger "life or limb". The Commission views this definition of an essential service as too restricted and one which is not sufficient in order to maintain public confidence in the event of a strike.

The Commission recommends that the definition of essential service in the *Public Service Labour Relations Act* be used to define essential services in the municipal sector. The Commission is of the opinion that this definition will instill public confidence in the labour relations system and provide clear direction to the parties as to what constitutes an essential service.

PART 5 DESIGNATION

I. DESIGNATION AND ITS ALTERNATIVES

It must be reiterated that collective bargaining had its origins in the private sector. In its initial stages of development the economic, political and social conditions in Canada were very different than they are today. Indeed, our underlying economic, political and social philosophies have changed considerably. Municipalities have grown in size and importance and have assumed the responsibility for providing many services to their citizens. At the same time, life has become more complex and interdependent. In the face of these emerging trends and conditions significant changes have been imposed on the collective bargaining system. The extension of bargaining rights to the public service has raised new issues for determination. One of these issues is how to find a method to resolve bargaining impasses in the public service. It is generally conceded that in the private sector employees should have the right to engage in economic sanctions in order to achieve their bargaining objectives. It is also generally conceded that employers in the private sector should have the right to lock-out their employees in order to achieve their objectives at the bargaining table. However, in the public sector there does not appear to be a consensus on these issues. Solutions vary from jurisdiction to jurisdiction.

There is considerable debate over what constitutes an essential service. In the Commission's view, essential services are limited to those services necessary to ensure the "health, safety or security of the public". A service which merely provides an amenity for the public convenience cannot be considered to be an essential service. There appears to be a consensus as to the interests to be protected. The difficulty is in defining and determining the proper response in a given situation. A flexible response is required which will accommodate the interests of the parties and the public.

The Commission's conclusion that flexibility is required in determining what constitutes an essential service is confirmed by a survey conducted by the Commission. The Commission surveyed all individuals who stood as a candidate in the 1986 municipal and school board elections in New Brunswick. It was assumed that these candidates had an appreciation of the needs of their communities. The results of the survey indicated that what was perceived as essential by those responding to the survey was influenced by whether the person had experienced a strike or lock-out and the particular circumstances of his community. The survey also indicated that what was perceived as being essential was also relative to the size and location of the municipality. For instance, snow removal was considered to be much more important in northern New Brunswick than in the southern part of the province.

The Commission is of the opinion that employees in the municipal sector should be free to engage in collective action including the right to resort to economic sanctions in order to achieve their bargaining objectives. Similarly, municipal employers should be free to resort to economic sanctions in order to achieve their objectives at the bargaining table. At the same time, however, the Commission recognizes that there are important distinctions between the private sector and the municipal sector. It is generally conceded that in the private sector the parties themselves bear the brunt of their economic sanctions. In the municipal sector it is recognized that the burden of economic sanctions may fall not only on the parties but to a significant extent on the public. Although the Commission recognizes the right of the parties to impose economic sanctions, these rights must be restricted in order to ensure the provision of essential services to the public. Reasonable restrictions on the parties are necessary in a free and democratic society. Finally, the Commission is of the view that it is not appropriate to discuss the rights of the parties or the rights of the public in absolute terms. Rather, the rights of the parties and the public must be thought of as points of origin from which a reasonable compromise must be reached.

In New Brunswick, restrictions on the right to strike take three forms: arbitration, contingency plans, and designation. Each method has its advantages and disadvantages.

A. ARBITRATION

Arbitration is a method whereby a third party is called upon to resolve a bargaining impasse. It may take two forms: voluntary arbitration and compulsory arbitration. Either form of arbitration may be resorted to by the parties for various reasons. If arbitration is used to resolve a bargaining impasse it is not necessary to determine what, if any, measures must be taken to ensure that the "health, safety or security of the public" is protected. Compulsory arbitration is currently used to resolve bargaining impasses involving firefighters. For a further discussion of arbitration see pages 89-103 of the report.

B. CONTINGENCY PLANS

In an effort to resolve bargaining impasses in municipal police departments while at the same time ensuring that there was "adequate provision for the protection of the public safety" the legislature enacted sections 91(5) and (6) of the *Industrial Relations Act*. The sections read as follows:

> 91(5) Notwithstanding anything in this Act, where this subsection applies, no police officer who is an employee within the meaning of subsection 1(3) or (3.1) shall strike or continue to strike and no municipality or board of police commissioners who is an employer within the meaning of the subsection shall lock-out any such employee where an order is made by the Lieutenant-Governor in Council prohibiting the strike or the continuance thereof or the lock-out or the continuance thereof.
>
> 91(6) Subsection (5) applies where in the opinion of the Lieutenant-Governor in Council, on report made by the Minister, the trade union or municipality concerned has not made or is unable to make or is likely to be unable to make adequate provision for the protection of the public safety.

Although section 91(6) provided a clear direction to the parties to ensure "adequate provision for the protection of the public safety" the legislation did not provide clear guide-

lines as to the extent and manner by which the public was to be protected. As a result of a number of strikes in municipal police departments, the Premier established in 1980 the Police Bargaining Committee to report on labour relations in municipal police departments. In its report the committee recommended the adoption of a uniform system for ensuring that the public safety was protected in New Brunswick municipalities. At the same time, however, the committee recognized that the percentage of the bargaining unit required to discharge the responsibilities placed on the parties by section 91(6) of the *Industrial Relations Act*, as interpreted by the parties, would vary depending on the size of the municipality. Consequently the committee recommended that the following percentages of the bargaining unit remain on duty during a police strike:

(a) twenty percent of the bargaining unit in municipalities with a police force of over fifty persons,

(b) thirty percent in municipalities with a police force of between eleven and fifty members, and

(c) forty percent in municipalities with police forces of less than eleven persons.

The committee also proposed that: (a) essential services be defined as those which if not performed would endanger life or limb; (b) all members of the bargaining unit be expected to respond in the case of a dire emergency; (c) individual police officers determine which calls are to be answered; (d) the union supplies the work force required by the plan, and (e) that marked police cars would be driven only by members of the bargaining unit. These proposals were adopted by the police unions in the province, however, many municipalities rejected them. As a result, under the auspices of the New Brunswick Industrial Relations Council, labour and management representatives from New Brunswick municipalities met to discuss further the development of contingency plans. While there was agreement on many issues the parties could not resolve the following issues:

(a) whether management or union members would determine which calls were to be answered, and

(b) whether patrols would be continued during a police strike.

The Council's failure to resolve these outstanding problems means that there are still no guidelines in place as to how the parties are to make "adequate provision for the protection of the public safety".

The philosophy underlying section 91(6) of the Act is that the parties must accept the responsibility to resolve their differences on their own. The Commission accepts this philosophy. Unfortunately, when bargaining becomes difficult the parties will often seek third party intervention. The Commission is of the opinion that the thrust of the legislation and government policy must always be based on the principle that the parties are responsible for resolving their differences on their own, yet recognize that in some instances third party assistance will be necessary. Section 91(6) of the Act empowers the Minister of Labour to approve or disapprove a plan adopted by the parties. However, the Minister was not provided with a formal statutory mechanism to assist the parties where they were unable to resolve their differences. It is apparent to the Commission that any system which is proposed to ensure that essential services are delivered to the public during a strike or lock-out must incorporate a method whereby any differences concerning the system can be resolved.

The Minister of Labour should generally be responsible for the labour laws within the province. In some cases, however, circumstances may dictate the delegation of his authority to an independent body. It is essential that there be a mechanism whereby a determination can be made as to the requirements necessary to protect the public during a strike. Those making the determination must be seen to be acting in the interests of the public and independent from political pressures. The method by which a final determination is made should be an adjudicative process rather than an administrative process. Consequently, the Commission is of the opinion that the responsibility for approving a plan to ensure that the "health, safety or security of the public" is protected

should rest with an independent body which could also impose a decision in the event that the parties were unable to resolve their differences. This issue must be resolved before the parties reach an impasse on the terms and conditions of the collective agreement. One of the failures of the existing system is that the parties do not attempt to establish a plan to protect the public until a bargaining impasse is reached. The parties cannot be expected to be inclined to agree on a contingency plan when a bargaining impasse has occurred. When a collective agreement is being negotiated the focus must be on the terms and conditions of that collective agreement rather than on the development of a contingency plan.

C. DESIGNATION

The third method, of ensuring that the public interest is protected in the event of a bargaining impasse, and that which the Commission is recommending for the municipal sector, is designation. Designation has been in use in the New Brunswick public service since the inception of bargaining by provincial government employees in 1968. Section 50(1) of the *Public Service Labour Relations Act* reads as follows:

> 50(1) Notwithstanding section 49, the Chairman shall not appoint a conciliation board until the parties have agreed on or the Board has determined pursuant to this section the employees or classes of employees in the bargaining unit to be designated employees whose duties consist in whole or in part of duties the performance of which at any particular time is or will be necessary in the interest of the health, safety or security of the public.

Designation appears to have worked reasonably well in the New Brunswick public service. The parties have demonstrated that they can deliver essential services to the public during a strike. In addition, it appears that the parties have not found designation to be an obstacle in realizing their collective bargaining goals. Indeed, the parties generally acknowledge that a system must be in place in order to ensure the protection of the public during a strike. It is also significant that the parties have not sought to replace the designation system by another system.

The Commission believes that one of the reasons why designation functions well with the New Brunswick public service is because it provides sufficient direction to the parties as to their responsibilities under the legislation. For instance, section 50(1) establishes the point in time at which designation is to take place, section 50(2) provides that the employer shall file a list of designated employees with the bargaining unit and the Public Service Labour Relations Board, section 50(3) provides a mechanism whereby the bargaining agent may object to the list filed by the employer and a method by which impasses may be resolved, and section 50(5) provides that the Board shall notify designated employees of their status. Another important aspect of the system which has contributed to its practical acceptance by the parties is the fact that the parties are given the first opportunity to determine who should or should not be designated. Indeed, there is a clear onus on the parties to do so. In the event they are unable to do so, a method is provided by which an impasse may be resolved.

The Commission is aware that labour and management have requested some changes in the existing designation system within the New Brunswick public service.[1] The Public Sector Panel of the New Brunswick Industrial Relations Council recommended that the designation process be completed prior to the commencement of collective bargaining. Otherwise, the parties are required to devote their attention to the designation issue when they are in the final stages of negotiating a collective agreement. The most important issues facing the parties at that point should be the bargaining issues in dispute. Another recommendation which the parties have made is that a designation plan

[1] Public Sector Panel recommendations, Industrial Relations Council, 1984.

which has been approved by the Board should be continued from one set of negotiations to another unless there is a material change in circumstances which would justify an amendment to the plan. In addition, the parties have recommended an administrative change. They have recommended that positions rather than individuals be designated. This is particularly important if the designation plan is to continue from one set of negotiations to the next.

The Commission recommends that legislation be enacted setting out a system of designation applicable to New Brunswick municipalities. In addition to the advantages already set out, the labour relations community in New Brunswick is generally familiar with the concept of designation. Moreover the system can easily be modified to meet the special needs of employers and employees in the municipal sector. The Commission believes that designation has clear advantages over its alternatives. Designation will instill more confidence in the minds of the public than the present approach.

II. IMPLEMENTATION OF DESIGNATION

A. INITIAL PROCEDURES

The Commission is of the opinion that the designation process in the municipal sector should be initiated in a manner similar to that by which it is initiated in the New Brunswick public service. Unless both parties agree that a bargaining impasse will be referred to arbitration, the employer shall initiate the designation process by setting out in writing a proposal as to the manner by which the employer would provide essential services to the public in the event of a strike. The employer shall set out in its proposal the positions in the bargaining unit which would be required to be designated in order to permit the employer to deliver those services which the employer considers essential to the public. A notice setting out this information shall be served on the bargaining agent for the relevant bargaining unit, the Minister, and the Board, one year prior to the

expiration of the collective agreement. The employer shall designate the positions identified on the proposal by job classification, job title and job level, as appropriate. For example, Clerk Typist, Clerk Typist III.[1] The employer shall also prepare a list of all individuals who are qualified to fill the designated positions in the bargaining unit setting out their job classifications, job titles and job levels, as appropriate.

The bargaining agent, within ten days of the receipt of the employer's notice, shall be required, in writing, to either accept the employer's proposal or to reject the employer's proposal stating the reasons for its rejection. A copy of the bargaining agent's reply shall be served on the employer, the Minister and the Board. If the bargaining agent accepts the employer's proposal, or if an amended proposal is subsequently accepted by the bargaining agent the employer shall submit the plan to the Board for approval.

In the event the bargaining agent or the Board does not accept the employer's proposal and the parties are unable to agree upon a plan within thirty days, the Minister may appoint a public interest co-ordinator who shall have all the powers of a conciliation board under the *Industrial Relations Act*. The public interest co-ordinator shall convene a meeting of the parties within ten days of the date of his appointment. He shall act as convener, conciliator, fact finder and mediator. The public interest co-ordinator, within thirty days of the date of his appointment, shall file with the Minister, the Board and the parties, any agreement which the parties are able to make or, in the event of their failure to come to an agreement, his recommendations with respect to the

[1] The Commission is aware that the degree of sophistication of classification procedures varies from municipality to municipality and the identification of positions will of necessity reflect this fact. For example, if a municipality has only one secretary there is no need to distinguish this position by any other term than "secretary" as there is no ambiguity as to which position the municipality is referring.

manner in which essential services are to be delivered to the public. Upon receipt of the agreement of the parties from the public interest co-ordinator the Board may approve the plan. In the event the parties are unable to agree, the Board may upon receipt of the recommendations of the public interest co-ordinator convene a hearing of the parties, within a period of thirty days, in order to establish a designation plan. At the hearing before the Board the parties would not be entitled to adduce further evidence but would be restricted to making submissions with respect to the report of the public interest co-ordinator.

In the event either party fails to discharge its obligations with respect to the development of a designation plan the Minister may take such steps as he deems necessary in order to ensure compliance with the Act, including the appointment of a public interest co-ordinator. In the event it is necessary to do so the public interest co-ordinator shall proceed in the same manner as when the parties are unable to agree on a designation plan.

The system which the Commission envisages separates the designation process from the bargaining process. This is important in order to maintain the integrity of the system. It is important to reiterate that the Commission is of the opinion that it is inappropriate to divert the parties' attention to the designation process at a time when bargaining is most crucial. Therefore, it is the Commission's intention that the designation process be completed at least seven months prior to the expiration of the collective agreement. This will enable the parties to select a bargaining route with a full appreciation of what will take place in the event of an impasse.

The Commission is of the opinion that the function of the Board should be to establish policies and guidelines with respect to the delivery of essential services. It would act in a supervisory capacity to ensure that the policies and guidelines are uniformly applied throughout the province. The effective operation of the system will depend in

the first instance upon the effectiveness of the public interest co-ordinator. It is clear that the public interest co-ordinator will play a major role in the operation and development of the designation system.

B. SUBSEQUENT DESIGNATION PLANS

If a designation plan was not established following implementation of the designation procedures in this report, then the procedures set out above would apply when the next agreement expired. However, once a designation plan has been approved by the Board it should remain in effect during subsequent negotiations unless there has been a material change in circumstances which would require an amendment to the designation plan in order to ensure the delivery of essential services. One year prior to the expiration of the collective agreement the employer shall, by notice in writing served upon the bargaining agent, the Minister, and the Board, indicate whether the employer intends to rely on a designation plan which has been established or whether the employer intends to seek an amendment to the existing designation plan on the grounds that there has been a material change in circumstances affecting the delivery of essential services. In the event the employer intends to seek an amendment the employer must set out the amendment and the reasons therefor.

The bargaining agent must within ten days of the receipt of the employer's notice serve a reply in writing on the employer, the Minister and the Board stating whether it accepts or rejects the amendments proposed by the employer and shall state in the notice whether the union intends to seek an amendment to the designation plan on the grounds that there has been a material change in circumstances which would affect the delivery of essential services to the public. In the event the union intends to seek an amendment it must set out the amendment and the reasons therefor.

If the parties agree on an amended designation plan the parties may submit the plan to the Board for approval. In the event of a dispute, either of the parties may apply to

the Minister for the appointment of a public interest co-ordinator who would proceed to determine whether there has been a material change of circumstances which would affect the delivery of essential services to the public. The public interest co-ordinator would proceed in the same manner as he would if the designation procedure were being initiated for the first time. If the public interest co-ordinator determines that there has not been a material change in circumstances he shall so advise the Board.

III. OPERATION OF THE SYSTEM

A. THE ROLE OF THE MINISTER AND THE BOARD

The Commission perceives that the Minister and the Board will each play an important role in the system. If the system is to work the parties must have confidence in it. To a large extent this will depend upon the ability of the Minister and the Board to administer the system in a manner which will command the confidence of the public and the parties.

The Minister will continue to be responsible for the overall administration of the system. It is the Minister who determines if and when a public interest co-ordinator shall be appointed. The Minister has the discretion whether or not to appoint the public interest co-ordinator and as such he has the power to maintain the pressure on the parties to resolve their differences without the assistance of his department. The Commission believes that the flexibility which the Minister will have is an important feature of the system. It is also the Minister who is responsible for ensuring that the parties discharge their obligations with respect to the designation system under the Act. In doing so he may use whatever resources are available to him in order to ensure compliance.

However, the Commission has recommended that the Board be given the power to approve designation plans. The Commission believes that it is appropriate for the Board

to exercise this function since it is a non-political body which will have management and labour representatives from the municipal sector. In addition, it is the Board that is best suited to adjudicate disputes between the parties. It is also thought that the Board's adjudicative and policy functions make it the appropriate body to establish guidelines for ensuring that essential services are delivered to the public in the event of a strike. The guidelines established by the Board should assist everyone in adjusting to the system and help to establish uniformity throughout the province. It is anticipated that the Board will develop its policies in consultation with the parties. In addition, the Board will be responsible for the enforcement of the designation provisions in the Act.

B. BRIDGING THE COLLECTIVE AGREEMENT

It is clear that if employees are to perform the work that has been designated as essential to the "health, safety or security of the public" during a strike, the terms and conditions of their employment must be clear. The Commission believes that the fairest and most expeditious method of providing for the terms and conditions of employment for the employees performing designated work, during the course of a strike, is to extend the collective agreement which has just expired to cover such employees.

C. THE ROLE OF THE EMPLOYER

In a system of responsible government, it is clear that the municipal employer must be responsible for the delivery of essential services to the public. The Commission believes that in order to maintain the integrity of the system the municipal employer must continue to be responsible for the delivery of essential services to the public during a strike. It would clearly be unfair and unrealistic to continue to hold a municipal employer responsible for the operation of the system without also ensuring that the municipal employer continues to have the authority to operate the delivery systems. It is the Commission's opinion that the municipal employer must continue to be responsible

for the operation of the municipality during a strike. The union is not responsible for directing the work force, nor should it be.

D. THE ROLE OF WORKERS OUTSIDE THE BARGAINING UNIT

The purpose of designation is not to limit the effectiveness of a strike. Rather, its purpose is to ensure that essential services are provided to the public during a strike by designating the work that is essential to the "health, safety or security of the public" and requiring employees in the bargaining unit to perform that work. However, if the effectiveness of a strike by bargaining unit employees is to be restricted as a result of designation, it would also seem appropriate that some restrictions be placed upon the employer in the methods by which the employer can respond to a strike by bargaining unit personnel. It is essential to maintain a balance between the employer and the bargaining unit. To the extent that designation will upset the existing balance it is necessary to adopt measures which will achieve the proper balance.

The clear purpose of designation is to ensure that essential services are delivered to the public by bargaining unit personnel. No provision can be made for the delivery of non-essential services to the public. Clearly, if the system is to work, the employer cannot be allowed to supplement the services provided by designated personnel with workers outside the bargaining unit, outside contractors, or replacement personnel. This would not only upset the balance between the employer and the bargaining unit but it would cause considerable friction between bargaining unit personnel and others who might be performing work for the employer. Such a situation would be untenable.

E. THE SELECTION OF THE WORK FORCE

During the course of a strike, the union and bargaining unit officials normally assign various members of the bargaining unit to tasks which must be performed if the bargaining unit is to carry on an effective strike. These duties must be attended to and

the union must have the flexibility necessary to carry out its objectives. Also, it is necessary for the union to be in a position to develop a cohesive strike force. This becomes more difficult when some of the bargaining unit employees continue to remain at work pursuant to a designation plan. For these reasons, the Commission recommends that the bargaining agent be given the right to select the members of the union who will perform the tasks necessary to ensure that essential services are delivered to the public. This should not be an unreasonable restriction on the right of the employer to manage its operations since the designation plan will set out those members of the bargaining unit who are qualified to perform the tasks necessary to ensure that essential services continue to be delivered to the public. The bargaining agent would be required to select workers from the list who are qualified to do the work according to the designation plan.

To ensure that the employer is able to effectively direct its work force the bargaining agent shall be required to supply a list of the names of employees who will perform specified tasks seventy-two hours in advance of the employee being required to work. In no event shall the bargaining agent give the employer less than seventy-two hours notice of the designated employees who will work. Therefore, the bargaining agent will have to continually provide updated lists to the employer.

It should be noted that the bargaining agent is also required, within the same time frame, to inform the employee that the employee will be required to work. It will be the bargaining agent's responsibility to ensure that the employee reports for work as assigned.

F. OVERTIME

The employer is required to state its requirements when it applies to the Board for the approval of a designation plan. In order to prevent any abuse of the system the employer should not be entitled to require designated employees to work overtime. The

Commission anticipates that during a strike by the bargaining unit the employer will not be able to get all of its work done. Some employers may attempt to assign overtime to designated personnel in order to limit the impact of the strike on the municipality. In order to prevent abuses the Commission recommends that the employer be prohibited from assigning overtime to designated employees.

G. ENFORCEMENT

It is clear that the Board should be responsible for enforcing the provisions of the Act. This is a natural role for the Board to assume.

The Commission is aware that either the employer or the bargaining agent may from time to time engage in an activity that would constitute a violation of the designation plan. For instance, an employer could attempt to supplement the designated work force by directing other employees to perform bargaining unit work, hiring replacement personnel, or hiring an outside contractor to do the work. At the same time it is recognized that the bargaining agent could breach the designation plan by failing to provide the employer with either proper notice of who will be performing the work or by failing to provide the employees.

In the event of a perceived breach of the designation plan, a party may serve the other party with a complaint which shall also be filed with the Board. The complaint shall set out the alleged violation of the designation plan and the remedy which the aggrieved party desires. The Board may upon the receipt of the complaint appoint an investigator to resolve the dispute. The investigator shall have all the powers of a conciliation board under the *Industrial Relations Act*. The investigator may establish his own procedure, hold a hearing if he deems it advisable and rely on heresay in making his determination. The investigator shall make an order resolving the dispute. Either party may within a further period of ten days apply to the Board to have the investiga-

tor's order set aside. The investigator's order shall have the same force and effect as an order of the Board.

The Commission is of the opinion that the Board should be given discretion whether or not to appoint an investigator. By giving the Board this discretion it will be able to maintain pressure on the parties to settle their differences on their own. It is anticipated that in some cases the Board may refuse to appoint an investigator to maintain pressure on the parties to settle a dispute on their own. In other instances, the Board may determine that the complaint is frivolous or vexatious and in the exercise of its discretion determine that an investigator should not be appointed. It is the Commission's expectation that the investigators appointed by the Board will be able to resolve disputes in a timely manner.

There are two possible violations of the designation plan which require special attention. The first involves non-designated employees performing bargaining unit work. Where there is a clear violation and the employer is using non-designated personnel to perform bargaining unit work, the Commission is of the opinion that the employer should be required to pay an amount to the bargaining agent which is equal to the amount paid to the non-designated personnel to perform the bargaining unit work. However, in order to be entitled to this remedy the bargaining agent must establish that the work was done with the knowledge that it was bargaining unit work. This could be done by the bargaining agent serving notice on the employer that the work is bargaining unit work. The Commission is of the opinion that the employer should not be subject to sanctions where management is performing tasks which are incidental to their job functions but which one could argue is bargaining unit work.

It should be noted that, while the employer may elect to provide services essential to the "health, safety or security of the public" by designation, the employer may also elect to provide those services by some other method. The municipality has several

other options, it may contract out for the services, it may hire replacement personnel to do the work of the bargaining unit, or it may request that other municipal employees perform the work of the bargaining unit. However, in the event the employer chooses the later alternative, it should be borne in mind that a person who is employed in one position cannot legally be "required" to perform the duties of another position.[1] On the other hand, it is recognized that employees may accede to the employer's request.

The second possible violation involves the bargaining agent failing to give proper notice to the employer of those employees who are required to work, or in failing to provide the employer with the required employees without reasonable excuse. In that event the employer would be entitled to make an application to the Board for an order permitting the employer to select the individuals to perform the designated work. This would be in addition to any other remedies which the employer would have. These employees would then be precluded from further participation in the strike.

IV BALANCING THE SYSTEM

In the present legislative framework a municipality suffers little economic loss during a strike. The Commission believes that although politics is the most important element in municipal bargaining that economic pressures should not to be disregarded. Therefore, it is the opinion of the Commission that in the event of a strike in which a designation plan is in effect that the employer should be required to pay into a special fund an amount equal to half the wages paid to employees who are performing the designated work during a strike. The payments shall be made within thirty days of the termination of the strike. The special fund shall be used to conduct labour relations training for the municipality and the bargaining unit. It shall be subject to the joint control and operation of the municipality and the bargaining agent.

[1] Brown v Canada Biscuit Co. Ltd. [1935] 2 D.L.R., 81 S.C.R. 212

It is apparent to the Commission that if the designation level is too high a strike could be rendered ineffective. The Commission therefore recommends that in the event the designation level exceeds twenty percent of the members in the bargaining unit and the employer indicates in its notice to bargain that it intends to use designation, that the bargaining agent should be given the right to unilaterally select arbitration as an alternative to the strike/lock-out route. In the event the bargaining agent elects to proceed to arbitration the bargaining agent would also have the right to select the form of arbitration to be used.

PART 6 THE BARGAINING PROCESS AND THE RESOLUTION OF INTEREST DISPUTES IN THE MUNICIPAL SECTOR

I. NOTICE TO BARGAIN

A. TIMING

The Commission received a number of submissions during the public hearings to the effect that negotiations for a collective agreement are often long and protracted and not concluded until long after the existing collective agreement has expired. There was a clear consensus that this problem could be remedied in part by commencing negotiations well in advance of the expiration of the collective agreement with a view to concluding a new collective agreement before the expiration of the existing one. The Commission shares this view.

When negotiations are long and drawn out, the focus of the parties is often distracted from the issues at the bargaining table. Issues that were important when bargaining commenced may become less so and other issues may emerge which become more important. The shifting focus of the parties may result in the bargaining relationship becoming unstable. It may also cause a loss of momentum.

The Commission believes that many negotiations are not only being frustrated by the length of time which it takes to negotiate a collective agreement, but also by the fact that a new agreement may not be concluded until months after the expiration of the existing one. It is important that the disputes between the parties be resolved in an efficient and timely fashion.

Section 33(1) of the *Industrial Relations Act* presently requires the parties to a collective agreement to give notice to bargain between thirty and ninety days prior to the expiration of the collective agreement. It is interesting to note that the Police Bargaining Committee recommended in 1981 that police negotiations commence four months prior to the expiration of a collective agreement. Subsequently, the General Industry

Panel of the New Brunswick Industrial Relations Council also recommended that bargaining for police commence four months prior to the expiration of a collective agreement.

The Commission recommends that bargaining for all municipal agreements commence at least six months prior to the expiration of a collective agreement with a view to concluding negotiations by the time the existing collective agreement has expired. If there is no collective agreement in force, then the Commission recommends that notice to bargain be given no later than two weeks after the designation process has been completed.

B. CONTENTS

The notice to bargain is intended to trigger bargaining. Unfortunately, the notice to bargain does not always activate the bargaining process. It appears that there are two reasons for this. First, in many cases, one or both of the parties are not prepared for bargaining. Second, the parties are sometimes reluctant to be the first to put their position on the table. To an extent each party engages in a waiting game to try to secure an advantage over the other party.

The system of collective bargaining which the Commission is recommending will provide the parties with five methods of resolving a bargaining impasse. The parties will be given an opportunity to agree on which route they will follow. They will be required to specify the route in the notice to bargain.[1]

The best method of ensuring that the parties actually commence bargaining when the notice to bargain is given is by requiring the parties to exchange offers. A party should, therefore, be expected to set out with its notice to bargain all of the changes

[1] The details of the five bargaining routes are found on page 79.

which it desires in the existing collective agreement as well as any new proposals. To ensure that the parties give sufficient recognition to the importance of the notice to bargain, the Commission recommends that once the parties have exchanged offers they be restricted to bargaining on those items set out in the notice to bargain. A party would not be entitled to raise a new issue for bargaining without the consent of the other party. Any term or condition of the existing collective agreement which is not the subject of a proposal for amendment would remain as is and constitute a term and condition of the new collective agreement.

In summary, the following information would be set out in the notice to bargain:

(a) the bargaining route selected by the party,

(b) (i) if an employer, whether or not the employer intends to use designated employees if a designation plan is in place, or

(ii) if a bargaining agent, whether the bargaining agent intends to use arbitration if the level of designation exceeds twenty p... bargaining unit and the employer intends to use designated employees to provide essential services during a strike, and

(c) any changes to the existing collective agreement which the party intends to make to the collective agreement or any new proposals which the party would like to place on the bargaining table.

C. THE ROLE OF THE MINISTER OF LABOUR

As stated previously, the Minister of Labour should be responsible for the overall administration of municipal bargaining. Accordingly, the parties should be required to file the notice to bargain with the Minister. The Minister will be responsible for exchanging the proposals of the parties. However, he will not exchange the proposals until he has received proposals from both parties. The Commission believes this will alleviate any concerns which a party may have about being the first to file a proposal with the Minister. This process should help to ensure that bargaining commences earlier since neither party will be able to gain a bargaining advantage by delaying the process. The

Minister of Labour will be responsible for ensuring that the parties comply with their responsibilities to file the notice to bargain on time and that the proper information is set out therein.

D. THE DATE OF THE FIRST MEETING

An analysis of disputes in the municipal sector which required third party assistance from the Department of Labour indicates that the time which elapsed from the time notice to bargain was given until the date of the first meeting by the parties was excessive. The average time which elapsed was as follows:

(a) 1980 - seventy-two days,

(b) 1981 - fifty days,

(c) 1982 - thirty-three days,

(d) 1983 - forty-six days,

(e) 1984 - one hundred and one days, and

(f) 1985 - fifty-three days.[1]

The reforms which the Commission is recommending will help to ensure that the first meeting between the parties will take place much sooner in the bargaining process.

The Commission recommends that the Minister, in consultation with the parties, establish the date and place of the first meeting between the parties. This meeting should take place no more than ten days after the Minister exchanges the notice to bargain with the parties' proposals. This should effectively ensure that the parties commence bargaining earlier and that some momentum is achieved.

The parties should be required to agree on the bargaining route within ten days of the exchange of the notice to bargain. If they cannot agree on a route within the ten

[1] Information supplied by the Evaluation Branch of the New Brunswick Department of Labour.

day period then the parties will be required to proceed in the public bargaining route. The parties shall advise the Minister which bargaining route will be in effect within ten days of their first meeting.[1]

II. METHODS OF DISPUTE RESOLUTION

A. ALTERNATIVES

There are a number of solutions to the dilemma of how to deal with an impasse in collective bargaining. Allow the parties recourse to economic sanctions, give the parties access to economic sanctions but provide a system of voluntary arbitration, impose compulsory arbitration or provide for wage boards. The Commission found that while wage boards may play an important role in the economic life of some countries, they are generally not thought to be an acceptable means of resolving economic disputes in Canada. Philosophically there appears to be little support for them in this country. Moreover, they are often perceived as operating in an unrealistic environment. Therefore, the Commission rejected wage boards as a possible solution and focused on the remaining alternatives.

It is generally conceded the best collective agreement is that achieved by the parties themselves. In *Dolphin Delivery Ltd. v Retail, Wholesale and Department Store Union, Local 580, Peterson and Alexander*, the Supreme Court of Canada per McIntyre J. stated the following at page 103:

> The basis of our system of collective bargaining is the proposition that the parties themselves should, wherever possible work out their own agreement.[2]

---

[1] The details of the five bargaining routes are found on page 79.
[2] *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580, Peterson and Alexander* [1987] 71 N.R. 83.

It is the parties who best know their collective bargaining goals and objectives. The employer normally has a broad range of policy options which it desires to achieve and limited resources with which to achieve them. The municipal employer must decide where it wants to expend its limited resources. Similarly, it is the bargaining agent and the union bargaining team which are best able to achieve a collective agreement which will satisfy the bargaining unit members. They are in the best position to understand the objectives of their members. The parties are therefore in the best position to reach a collective agreement, through the process of accommodation and compromise, which will be satisfactory to both sides.

It is difficult for an arbitrator to appreciate the tangible issues which may be in dispute between the parties. It is even more difficult for an arbitrator to gain an appreciation of the intangible issues of the bargaining relationship in the short time that the arbitrator spends with the parties to resolve their differences.

The Commission recognizes that it is much healthier for the parties to arrive at their own collective agreement. That way neither party can blame problems relating to the agreement on a third party. They must each accept responsibility for the collective agreement which they negotiated. The Commission also recognizes that from a philosophical and political point of view it can be said that arbitration is less acceptable in the municipal sector than in the private sector because it is the general view that municipal councils have a mandate to govern and must accept the responsibility for negotiating the municipalities' collective agreements. It is their mandate to do so and that mandate cannot be discharged by arbitrators. Municipal councillors are elected to exercise leadership and to make difficult decisions. These obligations should not be delegated to arbitrators. In a system of responsible government the municipal council must accept responsibility for the decisions which have an important bearing on the

community. Proponents of free collective bargaining also suggest that the result of arbitration is a complete loss of market discipline over the parties and that this results in collective agreements which do not reflect overall economic conditions in the community. The Commission acknowledges that the absence of market discipline is not good for the parties or for the community. Indeed, the arbitration fraternity is quick to recognize that it does not have the wisdom of Solomon.[1]

The Commission recognizes that although the parties should be encouraged to make their own collective agreements, arbitration is sometimes viewed by the parties as an acceptable alternative. This may be the case where the issues in dispute are very narrow. Arbitration may also be an acceptable alternative when one of the parties has very little bargaining power. In addition, arbitration may be an acceptable alternative where the bargaining relationship between the parties has deteriorated to such an extent that personal and philosophical differences have impaired the abilities of the parties to negotiate a collective agreement. It can be argued that arbitration may be an acceptable alternative if the use of economic sanctions would result in a threat to "the health, safety or security of the public". However, where designation may be used in order to ensure the provision of essential services to the public in the event of the use of economic sanctions the validity of this argument in favor of arbitration must be re-examined.

It is equally important to draw a distinction between compulsory and voluntary arbitration. With compulsory arbitration the parties have no alternative but to accept arbitration as the means of resolving their disputes. When the parties have no recourse to other methods of resolving their disputes, they often become frustrated with their bargaining relationship and their collective agreement, and all too often, they are quick

---

[1] Paul Weiler, Reconcilable Differences. (Toronto: The Carswell Company Limited, 1980), p. 227.

to blame their problems on "the system". This is not always the case but when it does happen the parties do not have a means whereby they can express their dissatisfaction. In addition, when the parties are compelled to use arbitration to resolve their differences, arbitration often takes on the characteristics of a wage board.

Voluntary arbitration on the other hand is thought to be more acceptable because the parties consent to its use. Also, because it is voluntary, the parties may from time to time use other methods of resolving their disputes. The fact that voluntary arbitration is not normally resorted to on a continuous basis means that the parties do not bargain in an unrealistic or artificial environment. They tend to maintain their overall relationship with the economy and the community as a whole. Moreover, if the parties have voluntarily consented to use arbitration to resolve their differences they cannot later complain that a system was forced upon them which they did not want. They are, therefore, more inclined to live by the arbitrator's agreement.

The Commission accepts the proposition that in the municipal sector the parties should have the right to resort to economic sanctions in order to achieve their collective bargaining goals providing the "health, safety or security of the public" can be ensured. It is thought that the parties are generally more successful in achieving their own collective agreement when they have recourse to economic sanctions than when they are required to proceed to binding arbitration. The possibility that either party may employ economic sanctions is a strong incentive for the parties to resolve their differences. It is acknowledged by the parties that binding arbitration is not the best method of forcing them to arrive at a collective agreement. The fact is that arbitration does not provide as strong an incentive for the parties to resolve their disputes on their own as the threat of a strike or lock-out. Binding arbitration does not induce the parties to resolve their differences. Rather, it becomes the final stage in the bargaining process whereas the strike or lock-out is only resorted to where the parties cannot otherwise resolve their

differences. If the parties are going to resolve their collective bargaining disputes on their own, then they must have economic sanctions available to them.

There are many things to be considered in fashioning a system for dispute resolution in the municipal sector. It is important for the parties to negotiate collective agreements which are reasonable and workable. This cannot be done if the sole objective in fashioning a system for the resolution of disputes is to prevent strikes or lock-outs. The Commission is of the opinion that the public supports this view providing a method can be found whereby the "health, safety or security of the public" can be maintained.

In discussing labour relations with various government officials, management representatives and union representatives across Canada, and in reviewing the current literature on labour relations in Canada, the Commission formed the opinion that various forms of dispute resolution are acceptable and workable in different jurisdictions at different times. No one system is universally endorsed and accepted, although it is recognized that the best collective agreements are those which are worked out by the parties themselves. It also appears that many systems are acceptable for a period of time after which the parties become familiar with the system and one or sometimes both of the parties are able to manipulate the system so that the equilibrium which was initially present when the system was established is destroyed. When this happens one or both of the parties become frustrated with the system, with the result that labour relations deteriorate. This is often referred to as the "half-life problem".

The Commission is of the opinion that the best way in which to combat this problem is to increase the number of methods by which the parties can resolve their disputes. Accordingly, the Commission has recommended five methods by which the parties may resolve bargaining impasses. These five routes can be divided into two categories, strike/lock-out routes and arbitration routes. The Commission proposes that there be two methods of resolving disputes if the parties wish to follow the strike/lock-out route.

One is public bargaining, the other is fact finding. If the parties wish to follow an arbitration route it is proposed that there be three methods by which the parties may resolve their differences. They are conventional interest arbitration, mediation-arbitration, and final offer arbitration. In the event the parties cannot agree upon which route to follow they shall be deemed to adopt the public bargaining method in the strike/lock-out route. In the event the parties agree to follow the arbitration route but cannot decide upon which method to adopt, the parties shall be required to adopt the conventional arbitration method of resolving their disputes.

B. THE STRIKE/LOCK-OUT ROUTE

1. Public Bargaining

The Commission is of the opinion that the public has a very keen interest in municipal labour relations. The public's interest is manifested by the high profile which municipal labour disputes are given by the media. This is not surprising as conflict always invites media attention. A bargaining impasse in the municipal sector is almost certain to command considerable attention from the media. In addition, many people in a municipality hold strong economic, political and social beliefs which they see as being consistent with the beliefs and attitudes of one side or the other to a dispute. Consequently, they tend to identify themselves with the group with which they have the greatest affinity. These are some of the intangible reasons why the public has such a keen interest in municipal labour disputes. A tangible reason is the fact that in the event a municipal dispute reaches an impasse which will be followed by either a strike or a lock-out it is the public which will suffer as a result of the withdrawal of services. The Commission is of the opinion that it is the threat of a strike or lock-out, the events surrounding the strike or lock-out, and how the strike or lock-out directly affects citizens, which sustain the public's interest in municipal labour relations. Another factor that accounts for the public's interest in municipal labour relations is the fact that it is

the public which will be required to pay the cost of any increase in wages or benefits to municipal employees. The cost of future wages and benefits is always of concern to a broad sector of the municipal population.

The parties are well aware of the public's interest in municipal labour relations, particularly at the time of impasse. The parties are also well aware of the influence which the public can bring to bear in resolving municipal labour disputes. It is not surprising, therefore, that each party to a dispute will make statements to the media that have no other purpose than to advance their position with the public. The statements, which are self-serving, are made for the sole purpose of influencing public opinion. Accordingly, in making statements to the media the parties attempt to adopt a posture which they believe will be favourably received by the public. When both parties attempt to do this, their statements often seem misleading and contradictory. This is not surprising given the objectives which the parties are attempting to achieve. They are more concerned with posturing than with conveying true and accurate information to the public. The Commission is of the opinion that the result has been to undermine public confidence in the collective bargaining system at the municipal level. This is unfortunate since the lack of confidence is not caused by the failure of the system but rather by the type of "public bargaining" which the parties have adopted. It is the Commission's opinion that this could be corrected in part by ensuring that the public has access to true and accurate information on the negotiations.

The Commission is of the opinion that the public has an important role in collective bargaining in the municipal sector. It is public pressure on the parties which eventually forces them to resolve their collective bargaining disputes. The public can become very upset with elected officials who they believe have adopted an unreasonable position which has resulted in the disruption of municipal services. All elected officials are aware of the fact that an unhappy electorate is not inclined to re-elect its municipal officials. At the same time, elected officials are also conscious of the fact that if they

accede to unreasonable demands for increases in wages and benefits that the public may react in the same way. It is not only the elected municipal officials, however, which must adopt a position acceptable to the public. Municipal employees are aware of the fact that if their demands appear to be unreasonable to the public that they will lose public support. The employees know that if that happens elected municipal officials may in fact wage a campaign against the employees and their union. In such circumstances the union's position often becomes untenable.

The Commission is of the opinion that because the public plays an important role in the collective bargaining process in the municipal sector and because it is the public that may suffer from the adverse consequences of the threatened or actual use of economic sanctions that it is necessary to ensure that the public receives true and accurate information on the status of the negotiations between the parties. In addition, it is thought that this will help to restore public confidence in the collective bargaining system. Today, more and more negotiations are being conducted in public with media campaigns by the parties.

It is the opinion of this Commission that the negotiations should be able to withstand public scrutiny if the parties are free to engage in economic sanctions. The Commission therefore recommends that if the parties select a strike/lock-out route they should be required to ensure that the public has access to accurate information as to the position each party has adopted. It is the Commission's opinion, therefore, that the parties should be required to conduct their negotiations in public to ensure that the public has full access to accurate information as to their positions.

The success of the public bargaining system will depend to a large extent on the full and fair disclosure by the news media of the positions adopted by each party. The Canadian Charter of Rights and Freedoms provides for freedom of the press:

> 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and

> expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

The Commission is satisfied that the media will accept its responsibility in conveying accurate information to the public.

As noted previously, the parties are required to select their bargaining route within ten days of the Minister exchanging the notices to bargain on their behalf. If the parties have agreed that they will follow the public bargaining route the municipal clerk shall post a notice stating the date, time and place of all meetings between the parties. If the parties have not agreed on which route they will follow then they shall be required to endeavour to determine which route they will follow at their first meeting. If they are unable to agree upon a route at that meeting, they shall be deemed to have selected the public bargaining route and the municipal clerk shall post a notice of the date, time and place of all subsequent meetings. The notice shall be posted in a conspicuous place in the clerk's office. Once the parties agree to follow the public bargaining route, or they are deemed to have selected the public bargaining route, the public shall be entitled to attend all meetings between the parties unless the meetings are closed by a conciliation officer.

In the event the parties reach an impasse either party may apply to the Minister for third party assistance. Upon the receipt of an application for third party assistance the Minister may appoint a conciliation officer to assist the parties in resolving their dispute. The conciliation officer, upon his appointment shall meet with the parties within a period of ten days. The meeting will be open to the public unless the conciliation officer determines that it would be in the interest of resolving the dispute to close the meeting to the public. It is recognized by the Commission that in some cases accommodation and compromise is easier to reach in private sessions. However, the Commission remains convinced that the system and the positions and the conduct of the parties should be able to withstand public scrutiny.

In the event the conciliation officer is unable to resolve the dispute he shall within 30 days from the date of his appointment, file a report with the Minister stating what progress has been made since his appointment, the positions of the parties on the outstanding issues, and his recommendations. The conciliation officer may require the parties to set out their positions at the conclusion of negotiations which he may attach to his report to the Minister.

The parties raised various concerns in their submissions at the public hearings about the effectiveness of conciliation under the *Industrial Relations Act*. The parties expressed concerns about the amount of time which it took for a conciliation officer to convene a meeting of the parties. Statistics supplied by the Evaluation Branch of the Department of Labour for disputes requiring third party assistance indicate the following time elapsed between the appointment of the conciliation officer and the first meeting:

(a) 1980 - twenty-seven days,

(b) 1981 - thirty days,

(c) 1982 - twenty-two days,

(d) 1983 - thirty-one days,

(e) 1984 - twenty-five days, and

(f) 1985 - thirty days.

The Commission is of the opinion that the time which elapsed between the appointment of the conciliation officer and the first meeting of the parties was excessive. It is recognized that a "cooling off period" may sometimes be necessary in the event of an impasse but it is also important to maintain whatever momentum has been achieved by the parties towards the resolution of their disputes. Consequently, the Commission is of the opinion that the conciliation officer should be required to convene a meeting within two weeks of the date of his appointment.

During Commission hearings, the parties also expressed concern about the role of the conciliation system in effecting the resolution of disputes. Submissions were made to the effect that conciliation officers too often adopt a passive role in attempting to resolve outstanding disputes. The Commission is of the opinion that conciliation officers should play an active role in attempting to resolve disputes. An impasse is often reached because the parties are over-committed to their positions. If that is the case the conciliation officer can often play an effective role by challenging and testing the positions of the parties. The conciliation officer may be the catalyst that is needed in order to enable one or both of the parties to soften their positions. It is very important, therefore, that the conciliation officer adopt an active role in resolving disputes. In addition, where the parties are antagonistic towards one another, either because of personality or philosophical differences, in order for the conciliation officer to be effective, the officer must assume an active role in chairing and directing meetings. The Commission therefore recommends that the Department of Labour review the role of its conciliation officers in resolving disputes.

There are two other aspects of the present conciliation services offered by the Department of Labour which require attention. The first is the fact that conciliation under the *Industrial Relations Act* is potentially a two-stage process. Initially, there is the appointment of the conciliation officer which may be followed by the appointment of a mediator or a conciliation board. Although the Minister's decision to appoint either a conciliation officer, mediator, or a conciliation board is discretionary, the fact is that it is a two-stage process. This fact often weakens the position of the conciliation officer since the parties know that there may be another step between the appointment of the conciliation officer and the point at which they may face economic sanctions. The conciliation officer could be more effective in dealing with the parties if there was not the possibility of the appointment of a conciliation board following the discharge of his duties. It should be noted that the Commission received submissions to the effect that

one of the reasons why conciliation boards were sometimes more effective than conciliation officers was the fact that the parties each had a nominee on the conciliation board. While the Commission accepts that this may be useful in some instances, the Commission is of the opinion that the Department of Labour's conciliation officers have established themselves as being impartial. So long as the Department of Labour's conciliation officers are regarded as being impartial they should be able to command the confidence of the parties and be able to work with them towards achieving a collective agreement.

The second aspect of the conciliation system which requires attention is the conciliation officer's report. Pursuant to section 61(1) of the *Industrial Relations Act* the conciliation officer is required to file his report with the Minister. However, the legislation does not provide a mechanism whereby the Minister may release the report either to the parties or the public. Nor is it the practice for the Minister to release the report. It is the Commission's opinion that it is public opinion that forces the parties to resolve their outstanding differences. In view of this fact the conciliator's report should be a focal point for public opinion when a strike/lock-out route is followed. Consequently, the Minister should be able to use the report to focus public opinion and to put the responsibility on the parties to resolve the outstanding issues. The Commission recommends that legislation be adopted requiring the Minister to release the conciliation officer's report to the parties within ten days of its receipt by him. The parties should have another ten days in which to consider the conciliation officer's report. If they have not resolved their outstanding issues at the expiration of the ten day period then the Minister would be required to release the report to the public.

The Commission expects that the release to the public of the conciliation officer's report would result in public pressure on either one or both of the parties to settle their disputes. In order to give public opinion an opportunity to exert pressure on the parties, the Commission is of the opinion that the parties should not have the right to impose a

strike or a lock-out until ten days following the release of the conciliation officer's report to the public.

2. The Fact Finding Route

The second method of resolving disputes in the strike/lock-out route is fact finding. The fact finding process is basically a private process, which in the event of impasse, leads to the appointment of a fact finder before the parties may resort to economic sanctions. The fact finder provides the public with accurate information concerning the issues in dispute.

There are three reasons why this process should be private until the fact finder's report is made public. First, in New Brunswick the negotiation process between the parties has traditionally been conducted in private, notwithstanding the fact that the parties have often issued statements to the press in an effort to win public support for their positions. While the Commission sees considerable justification in opening the entire process to public scrutiny, the Commission recognizes that some parties may be uncomfortable bargaining in public. Therefore, the Commission is of the opinion that the parties should be given the opportunity to conduct their negotiations in private. Second, it is generally acknowledged that the parties find it easier to make accommodations and compromises in private. Private negotiations allow the parties greater flexibility in reviewing their positions and relaxing their demands. Third, the Commission recognizes that there may be some municipal negotiations which would not have a high profile in the media. This could well be the situation where the bargaining group is very small and does not perform a service, the withdrawal of which, would threaten the "health, safety or security of the public" or cause significant inconvenience. In such a situation public opinion is not likely to force either of the parties to modify their negotiating positions. Since public pressure is unlikely to have any affect on these

negotiations there is no reason why negotiations cannot be carried out in private where there may well be a greater likelihood of accommodation and compromise.

Fact finding has become a popular method of resolving disputes in many jurisdictions in the United States. It has also been used with considerable success in the education sector in Ontario.[1]

The Commission is of the opinion that in a private process which is sheltered from public opinion an adjudicative system of dispute resolution may function better than a conciliatory system. Fact finding more closely resembles an adjudicative type of system than a conciliatory type of system. In fact finding the third party attempts to measure the proposals of the parties against criteria which he believes it is appropriate to use in the circumstances. The fact finder is less concerned with discovering the final positions of the parties than providing criteria against which their proposals may be measured. It is thought that the fact finder's recommendations which flow from his objective evaluation of the criteria should be sufficient to induce the parties to modify their positions. Fact finding is a very different process than conciliation which is a process whereby a third party explores the opportunities for settlement. This is not to say that a fact finder will not explore the same opportunities for settlement; however, the fact finder is also expected to evaluate the proposals of the parties against appropriate criteria. Indeed, the fact finder may resort to information and materials which are not submitted to him by the parties in making his determination. The fact finder, therefore, is not only expected to seek an accommodation and compromise between the parties; he is given the additional task of "judging" the positions of the parties. This should give the fact finder added credibility and weight in the media.

[1] Ontario *School Boards and Teachers Collective Negotiation Act.*

It should be noted that not only are the parties required to bargain in private if they accept the fact finding route to resolve their disputes; they are also prohibited from issuing statements to the press concerning their positions or the progress of negotiations. However, in the event the parties are unable to resolve their differences, once the fact finder's report is made public, the process becomes open to the public and the parties may issue statements to the media. The Commission is of the opinion that by placing a restriction on the publication of information related to negotiations until the fact finder's report is made public, the fact finder's report will become the focal point of media attention. If this happens then public opinion should pressure each side to move closer to the fact finder's recommendations.

The parties can only use fact finding as a method of resolving their disputes if they both agree to use it. Fact finding cannot be imposed on them. The parties have the option of selecting fact finding until ten days after the notices to bargain are exchanged by the Minister. If they adopt the fact finding route they are required to meet and bargain in good faith. If an impasse is reached either or both of the parties may apply to the Minister for the appointment of a fact finder. The Minister would also have the prerogative to appoint a fact finder on his own initiative provided the parties selected the fact finding route.

The fact finder is required to convene a meeting with the parties within ten days of the date of his appointment and to file his report with the Minister within thirty days of the date of his appointment. The fact finder's report is submitted to the parties within ten days of its receipt by the Minister. If the parties fail to come to an agreement the Minister shall release the report to the public within a further period of ten days. The parties would not be entitled to proceed to a strike or lock-out until ten days after the fact finder's report is released to the public.

In discharging his duties the fact finder would have all of the powers which a conciliation board has under the *Industrial Relations Act*. As such the fact finder would be able to receive evidence, issue subpoenas, receive submissions and, in addition, rely on information which he has determined is appropriate in the circumstances even if it has not been provided to him by the parties. He could determine his own procedure. The fact finder in his report would identify the issues in dispute and, to assist him in doing so, he may require the parties to file with him their positions on the outstanding issues. The fact finder shall also include in his report his recommendations concerning the issues in dispute. In making his report the fact finder shall utilize the same guidelines which apply to arbitrators (see page 93).

The Commission is of the opinion that the fact finder's report should be an important focus for public opinion as the possibility of economic sanctions approaches. The fact finder's report will have been made public only after a period of time during which no information has been conveyed to the public concerning the negotiations by the parties. Given the vacuum of information the fact finder's report should immediately become the focal point for public discussion.

C. THE ARBITRATION ROUTE

1. The Framework For Arbitration

a. The Appointment Of Arbitrators

The *Industrial Relations Act* contemplates voluntary and compulsory interest arbitration in sections 79 and 80, respectively. Section 79 sets out the circumstances in which the parties may voluntarily agree in writing to proceed to binding arbitration to resolve their bargaining impasses. Section 80 provides the method whereby the firefighters who must use arbitration to resolve their bargaining impasses may proceed to arbitration. As well, it sets out the circumstances in which the Lieutenant-Governor in

Council may refer a bargaining dispute involving the police to arbitration. The procedure for appointing the arbitrator or arbitration board is set out in section 55(2) of the Act.

Under section 55(2) either party may commence the procedure for referring an impasse to arbitration. This may be done by giving the other party a notice setting out the party's nominee to the arbitration board. The opposite party is required to respond within a period of five days setting out the name of its nominee. Within a further period of five days the two nominees must select a chairman. In the event one of the parties is unable to name a nominee or the nominees are unable to agree upon a chairman the Minister may make the appointment.

The Commission is of the opinion that the method of providing notice and the time frames provided for the appointment of an arbitrator or arbitration board as set out in section 55(2) of the Act are acceptable. However, the Commission has two concerns with regard to the appointment of the arbitrator or arbitration board.

The first concern is that the present legislation seems to encourage the parties to use a three-member board of arbitration rather than a single arbitrator to resolve disputes. While the legislation does not prevent the parties from using a single arbitrator, it focuses on three-member arbitration boards. The Commission is of the opinion that there are problems with three-member arbitration boards. They tend to be more expensive and more time consuming. Furthermore, a single arbitrator who has the confidence of the parties should be able to resolve bargaining impasses as effectively as a three member arbitration board. If the parties do not have confidence in the neutral chairman then no matter what the size of the arbitration board, the decision of the board will not be accepted by the parties to the extent that it might otherwise be accepted if the parties had full confidence in the chairman. The Commission is also of the view that many of the bargaining units in New Brunswick are of a relatively small size and that the cost of

a three-member arbitration board cannot be justified. In addition, bargaining disputes could be resolved more effectively with a single arbitrator since scheduling would be simpler and there is no possibility of a dispute between the members of the board which would delay a final decision being made. It is important that arbitrators render their awards in a timely fashion. Bargaining disputes should not be allowed to linger. A quick resolution is advantageous to both parties. Another problem with three-member arbitration boards is the trend for a member of the board to issue a dissenting opinion even though it is not recognized as having any validity in law. This is not conducive to the effective operation of the system as one party continues to have lingering doubts about the fairness of the decision.

The second concern is that if the nominees of the parties cannot agree upon a chairman, the Minister may relieve the nominees of that responsibility by appointing the chairman while the nominees continue to serve as members of the arbitration board. If the nominees to an arbitration board cannot agree on a chairman then they have not discharged their role as the representatives of the parties on the arbitration board. The nominees must demonstrate that they can work together effectively to resolve the dispute between the parties. If the nominees are unable to agree upon a chairman and the Minister is required to make the appointment, the nominees should be relieved of their duties as members of the arbitration board. If the Minister is required to make the appointment he would be required to do so from a list of registered arbitrators. A system for the registration of arbitrators is set out commencing at page 142.

The Commission also recommends that in the event the parties agree to use interest arbitration to resolve their dispute but do not determine whether or not they wish to use a tripartite board or a single arbitrator the parties shall be required to use a single arbitrator. In the event the parties are unable to determine who shall act as arbitrator the Minister shall appoint the arbitrator from the list of registered arbitrators.

b. Maintaining Confidence

i) The Arbitrator

One of the problems with interest arbitration in New Brunswick is that the parties have not always had confidence in the arbitrators. It appears that there are two reasons for this. The first is that the arbitrator, or the chairman of the arbitration board, who is expected to be a neutral and accepted by the parties as such is often viewed with some apprehension by one of the parties to a dispute because he has been associated with the interests of either employers or unions in the past. The reason for this is that many arbitrators began their careers representing the interests of either employers or unions in the province. It is extremely difficult for individuals wishing to pursue a career in the labour relations field and arbitration, without doing so. Another reason is that in New Brunswick there is no formal method for educating and training arbitrators. Arbitrators are expected to know how to conduct an arbitration hearing and render an award relating to the concerns of the parties. These concerns can be addressed by providing a system for the education and training of arbitrators similar to that which exists in other provinces. This would ensure not only that arbitrators are educated and trained for the roles which they will be required to perform but also that interested persons may gain entrance to the profession by some means other than acting as a representative of either or both of the parties (see page 142 for details).

ii) The System

Interest arbitration must have the confidence of the parties if it is to be accepted as a method of resolving bargaining impasses. One of the problems with arbitration under the present Act is that there are no guidelines in place for arbitrators to follow. The absence of guidelines means that arbitrators have considerable discretion in exercising their office. While this allows flexibility, the absence of guidelines also results in some

reluctance on the part of the parties to use arbitration as a method of resolving a bargaining impasse as they are uncertain about the factors an arbitrator will take into consideration in rendering an award. Some jurisdictions in Canada have developed guidelines for arbitrators and set these out in their legislation.[1] It is the view of this Commission that if arbitrators and the parties knew what factors an arbitrator would take into consideration in rendering an award, arbitration would become a more acceptable method to resolve bargaining disputes. The Commission therefore recommends that specific guidelines be set out in the legislation to assist arbitrators in rendering their awards.

The Commission is of the opinion that arbitrators should be guided by the following considerations:

a. the public interest, including the economic and social results of the settlement;

b. the terms and conditions of employment in similar occupations outside the employer's employment;

c. the need to maintain appropriate relationships in the terms and conditions of employment between different classifications;

d. the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, work performed, responsibility assumed and nature of the services rendered;

e. local economic conditions and in particular labour market conditions;

f. the financial status of the municipality; and

g. those terms and conditions of employment which have already been agreed upon by the parties.

---

[1] *Alberta Labour Relations Act* s.117.8, *Alberta Police Officers Collective Bargaining Act* s.15, *Alberta Public Service Employee Relations Act* s.55, *British Columbia Labour Code* s.7.(1), *Canada Public Service Staff Relations Act* s.68, *Nova Scotia Civil Service Collective Bargaining Act* s.32(2), *Ontario Crown Employees Collective Bargaining Act* s.12(2), *Quebec Labour Code* s.79.

The Commission wishes to stress that an arbitrator should be required not only to take into consideration the "private" interests of the parties, but also the effect of any settlement on the economic and social fabric of the community. In some municipalities the municipality is one of the largest employers. As such, the terms and conditions of employment between a municipality and its employees will serve as an important benchmark for the terms and conditions of employment in other sectors of the community. It is important for arbitrators to be sensitive to local conditions. Arbitration should not be regarded as a method of resolving disputes according to abstract notions of fairness and justice. Rather, arbitration should be considered to be an exercise in discovering labour market realities.[1] Otherwise, an arbitrator's decision will not be realistic, and if it is not, it will be neither fair nor just. In addition, it could result in a gross misallocation of resources within the community.

Another factor which has contributed to the lack of confidence in the system is the actions of the parties themselves. It is not uncommon for the parties to challenge a decision which is made by an arbitrator. The parties must recognize that when they submit their dispute to arbitration that they may not get the decision which they want.

If they recognize this fact then there should be no reason for the parties to challenge the decision in the courts. If arbitration is to be an effective means of resolving bargaining disputes then the parties must ensure that it is final and conclusive. The integrity of the system demands that the parties respect the decisions of the arbitrators which have either been selected by them or appointed by the Minister. The parties must remember that an effective system of arbitration is in their own long-term best interests.

[1] Re *Canadian Union of Public Employees and Province of New Brunswick* (1984) 49 N.B.R. (2d) 31.

By continually challenging the decisions of arbitrators the parties are giving priority to their short-term bargaining objectives rather than their long-term objectives which should include an amicable relationship during the term of the collective agreement. This can never be achieved if the parties are continually challenging the decisions of arbitrators. The parties must act in a responsible and mature fashion. It is also the Commission's opinion that if the parties restrain themselves in this manner and stop abusing the system that public confidence in the arbitration system and labour relations in general will be restored.[1]

2. The Conventional Arbitration Route

Conventional arbitration as envisaged by the Commission may involve third party assistance in the form of a conciliation officer and final resolution of the dispute through binding arbitration.

Under the conventional arbitration system, where an impasse in bargaining occurs, either or both of the parties would have the right to apply for the appointment of a conciliation officer which the Minister could appoint in the exercise of his discretion. The Minister would also have the right to initiate the appointment of a conciliation officer if he deemed it advisable. However, it should be noted that to proceed to binding arbitration the parties would not necessarily have to complete conciliation.

In the conventional arbitration system envisaged by the Commission the appointment of the conciliation officer is at the Minister's discretion. In addition, there is no

[1] The arbitration award involving *The City of Saint John v. Local 61* is an example of the problems which can arise when the parties fail to accept the decision of an arbitrator. This arbitration was followed by a further hearing by the arbitration board, court proceedings and an application to the Court of Appeal. The final provisions of the collective agreement were established twenty-five months after the initial collective agreement expired.

provision for the appointment of a conciliation board or a mediator and the arbitrator may not attempt to conciliate or mediate the dispute. The arbitrator is restricted to performing an adjudicative function. This procedure will provide the parties with a clear and efficient process for resolving their bargaining disputes while maintaining pressure on them to resolve the dispute themselves. The parties know that once they have proceeded past the conciliation officer stage that there will be no third party assistance available to them in the form of conciliation or mediation. Because it is at most a two-step process the pressure should remain on the parties to resolve their own dispute.

It should be noted that there are two ways to get to the conventional arbitration route. First, the parties may agree to follow the conventional arbitration route. Second, in the event both parties select arbitration but cannot agree on which arbitration route to follow, they are deemed to select the conventional arbitration route.

Section 76 of the *Industrial Relations Act* sets out the powers of an arbitrator under the Act. These powers would also be applicable to an arbitrator appointed to a dispute where the conventional arbitration route is followed. In conventional arbitration the arbitrator would be empowered to determine procedures and receive such evidence as he sees fit. In addition to adducing evidence, the parties would be entitled to make submissions. In making his award, the arbitrator may choose from the submissions of the parties or fashion an award which he deems appropriate in the circumstances. In either event, the arbitrator would be required to utilize the guidelines set forth for arbitrators (see page 93).

The procedure for selecting conventional arbitration is to be initiated within ten days of the date the Minister exchanges the parties' offers. At that point the parties may agree to follow the conventional arbitration route or, if they have agreed to arbitration but not determined a route, they will be deemed to have selected conventional arbitration upon the expiration of ten days from the exchange of the offers. It should be

noted that the parties are required to hold at least one meeting within that ten day period at a date, time and place established by the Minister in consultation with the parties in order to determine which route they will follow. The parties are then required to commence bargaining. In the event an impasse is reached either or both parties may apply for the appointment of a conciliation officer. In addition, the Minister may at any time appoint a conciliation officer to assist the parties. The conciliation officer must meet with the parties within ten days of his appointment and failing an agreement make a report to the Minister within thirty days of the date of his appointment. The conciliator would function in the same manner as a conciliator appointed in the public bargaining route (see page 79) and have all the powers of a conciliation board. However, the conciliation officer's report would only be filed with the Minister, it would not be released to the parties or made public. In the event the parties are unable to conclude a collective agreement either or both parties may initiate the procedure for the appointment of an arbitrator. The procedures for the appointment of an arbitrator have been previously outlined. The arbitrator would be required to meet with the parties within ten days of the date of his appointment and make an award within a period of thirty days from the date of his appointment.

3. The Mediation-Arbitration Route

The system for resolving bargaining impasses in New Brunswick under the *Industrial Relations Act* may involve the appointment of a conciliation officer followed by the appointment of a conciliation board and eventually arbitration. While there may be some advantages to a three-step procedure to resolve bargaining disputes the fact is that the three-step procedure does not put sufficient pressure on the parties to resolve their disputes and may in fact result in any momentum which the parties have achieved being dissipated as the parties move from one step to the next under the legislation. It should be noted that although the Commission has characterized the dispute resolution process under the Act as being a three-step process, it could be said that the present interest

arbitration system is in fact a two-step process in itself. Section 79(4) of the *Industrial Relations Act* reads as follows:

> The arbitrator or arbitration board appointed or constituted under this section shall endeavour to bring about a settlement of the differences between the bargaining agent and the employer and to formulate an agreement which, upon being entered into by the parties, shall be a collective agreement under this Act.

The system of arbitration provided for under the Act is commonly described as mediation-arbitration. Under this system of arbitration, the arbitrator has the power to endeavour to bring about a settlement between the parties other than by means of adjudication. Although it is clear that under section 79(4) of the Act an arbitrator could endeavour to mediate a bargaining dispute, it is the Commission's understanding that very few arbitration boards have made an effective effort to mediate a dispute before rendering an award. Most arbitrators have proceeded with the adjudicative stage of the process without attempting to mediate the dispute.

An arbitrator which has the power to make a final decision with respect to an outstanding dispute between the parties should be able to exercise considerable influence with the parties in performing a mediation role. Still, an arbitrator has a difficult task to perform. In *Economic Aspects of Interest Arbitration*, Morley Gunderson stated the following at page 16:

> On one hand, the greater certainty regarding the magnitude of the arbitrated settlement reduces the risk associated with going to arbitration. So there may be less pressure to settle before arbitration. On the other hand, if the parties learn the arbitrator's preferences during the mediation stage, they may be more likely to settle then and save the cost of going to arbitration. Such a settlement is not, however, one reached purely by the parties themselves; rather, it reflects their knowledge of what the mediator is likely to do in arbitration. In the extreme, if they learn the likely arbitrated outcome too early, the mediation stage becomes the arbitration stage, even if a negotiated settlement is reached.[1]

[1] Morley Gunderson, Economic Aspects of Interest Arbitration (Toronto: Ontario Economic Council, 1983) p. 16.

Clearly, an arbitrator must use his power wisely if he is to be an effective mediator. He must not use mediation simply as an informal method of adjudication, for if he does he has not properly mediated the dispute. However, the arbitrator's power to make a final decision in the matter does mean that he speaks with considerable authority. He has the power to decide the dispute and the parties cannot ignore his approach during the mediation stage.

If the parties select the mediation-arbitration (med-arb) route they will not have available to them the option of making an application to the Minister for the appointment of either a conciliation officer or a conciliation board. The Commission is of the opinion that these intermediate steps merely serve to take the pressure off the parties. The Commission believes that it is important that the pressure remain on the parties to resolve their disputes; it should be clear that the responsibility to settle the terms of the collective agreement rests with the parties. In the med-arb system the arbitrator performs both a mediation and an arbitration function. In addition, the Commission wishes to reiterate that many of the bargaining units in New Brunswick are quite small by comparison to other provinces. To some extent it can be said that the number of intermediate steps between the time collective bargaining commences and the appointment of the arbitrator results in costs which cannot be justified.

As noted previously, the parties have ten days from the date on which the Minister exchanges the proposals between the parties to convene their first meeting and determine which bargaining route they will use to resolve an impasse. If the parties desire to follow the med-arb route they must do so within that ten day period. They must continue to meet and bargain in good faith but they do not have the option of applying to the Minister for the appointment of either a conciliation officer or a conciliation board. In the event a bargaining impasse has been reached, either or both parties may apply to the Minister for the appointment of an arbitrator. As well, the Minister may appoint an

arbitrator on his own initiative. The arbitrator shall meet with the parties within two weeks of the date of his appointment and file a final award within thirty days of the date of his appointment.

It is expected that if this route were followed the arbitrator would meet with the parties in an attempt to bring about a settlement. In the event he failed to do so he would proceed to arbitrate the dispute in the same manner as he would if it were a conventional arbitration.

In order for med-arb to work effectively the parties should be restricted to using the system with a single arbitrator. A single arbitrator is best able to mediate effectively with the parties and still maintain his role as an adjudicator. It is also the Commission's opinion that it is more difficult to reach a consensus with a board of arbitration and that a sole arbitrator can more effectively mediate the issues in dispute.

4. The Final Offer Arbitration Route

The final offer arbitration route envisaged by the Commission would be a two-stage process. It would consist of conciliation by a conciliation officer appointed by the Minister of Labour and arbitration using either a single arbitrator or an arbitration board.

In the event of a bargaining impasse either or both parties could apply to the Minister for the appointment of a conciliation officer. As well, the Minister would have the power to appoint a conciliation officer on his own initiative. There would be no provision whereby a conciliation board could be appointed. The conciliation officer shall file his report with the Minister and in it he shall set out the final positions of the parties at conciliation. As was the case under the public bargaining system, the conciliator would have all the powers of a conciliation board and the power to require the parties to submit their final positions for the purpose of filing his report.

One of the main problems with arbitration is the fact that arbitration often becomes the final step in the bargaining process rather than the method of resolving an impasse. In order to remedy that problem the Commission recommends that in the event the parties elect to follow the final offer arbitration route that the parties not be permitted to adopt a position at arbitration which they did not present at conciliation. This should help to make the conciliation stage of the process more meaningful and more effective. The possibility of the parties achieving a collective agreement by themselves should be enhanced.

One of the major problems with final offer arbitration is the fact that the arbitrator must select the offer of one of the parties as his award in the dispute. Although it is the fear of this happening that often induces the parties to settle prior to submitting their dispute to final offer arbitration, the result of this procedure may be that one of the parties is able to obtain something in final offer arbitration which they would never be able to obtain under any other circumstances from the other party. The result may be a collective agreement which contains a provision which is so objectionable to the other side that it colours the whole relationship between the parties. The Commission is of the opinion that if the system is to work and to be acceptable to the parties some method must be found whereby such provisions do not become part of the collective agreement between the parties. It should not be the fear of a totally unreasonable provision in a proposal being accepted by an arbitrator that makes the system work. Rather, it should be the expectation that unless reasonable compromises are reached either party may lose what might have been available to it through negotiation.

Wages and benefits can be quantified and therefore lend themselves more easily to assessment by an arbitrator. Such items can be quantified according to their monetary value. Non-monetary items on the other hand can be unrelated. One party may include in its package an item that would not be acceptable to the other party under any circumstances. The result will be a collective agreement that may lead to a deterioration of

labour relations over the long term. Consequently, the Commission is of the opinion that an arbitrator should be given some discretion to select from the proposals of the parties in making his final award on the non-monetary items.

In appointing an arbitrator the parties would be required to identify for the arbitrator those items which are to be considered as monetary items and those which are to be considered as non-monetary items. In the event the parties are unable to agree which items are monetary items and which are non-monetary items the arbitrator would make the determination and so advise the parties. After doing so he would be required to deal with the monetary items on a package basis - i.e. he would either accept the employer's position on all monetary items or he would accept the union's position on all monetary items. The remaining non-monetary items would be dealt with on an item-by-item basis - i.e., the arbitrator would accept either the position of the union or the position of the employer on each item. It is recognized, however, that there will be inconsistencies and contradictions between the items in the two proposals. Therefore, although the arbitrator would be prohibited from fashioning his own award he could, of course, fill a gap or void which might arise where the items in the two proposals are contradictory, inconsistent, or ambiguous.

The Commission is of the opinion that this form of final offer arbitration should work effectively to maintain the pressure on the parties to resolve their own disputes while at the same time providing the arbitrator with the powers which he will require in order to make a good award in the event it is necessary for him to do so. This system has the merit of being sufficiently rigid in that the parties should realize that they may lose a considerable opportunity by going to arbitration while at the same time providing sufficient flexibility that the award which is rendered will not be intolerable to either party.

As with the other arbitration routes, the parties are required to meet and determine which method they will select within ten days following the exchange of proposals by the Minister. The parties can only proceed to final offer arbitration by mutual agreement. They are required to bargain in good faith. If an impasse is reached either or both of the parties may apply to the Minister for the appointment of a conciliation officer. As well, the Minister could appoint a conciliation officer on his own initiative. The conciliation officer would be required to meet with the parties within ten days of the date of his appointment and file his report with the Minister within thirty days of the date of his appointment. As indicated previously, the conciliation officer could require the parties to file their final positions with him and he would include that in his final report to the Minister. The conciliation officer's report would not be released to the parties or the public. In the event the impasse continues the parties would proceed to nominate their nominees to an arbitration board in accordance with the provisions of section 55(2) of the *Industrial Relations Act*. The arbitration board or the arbitrator would be required to convene a meeting with the parties within ten days of the date of his appointment and to render his award within thirty days of the date of his appointment.

The arbitrator would follow the same procedures as set out for arbitrators performing conventional arbitrations. These procedures are set out on page 96 of the report.

D. BALANCING THE SYSTEM

1. The Last Offer Vote

Bargaining disputes in the municipal sector in New Brunswick have been accompanied by charges by both sides that offers which are made at the bargaining table are not being properly or fairly presented by the other party's representatives at the bargaining table to their principals. There is no doubt some merit to these allegations as it appears that the parties often issue contradictory and conflicting statements concerning their

positions in the press. The Commission accepts that each of the parties attempts to present its proposals in the most favorable light when an impasse is reached in order to marshall public opinion in its favor, however, that alone does not account for the scale of the contradictions and conflicts that are readily apparent when the parties are involved in a bargaining dispute. A mechanism must be put in place which would force the parties to ensure that the representatives of the parties properly inform their principals and the public of the facts and matters in issue. This would not only force the parties to bargain more responsibly, it would assist in restoring public confidence in the collective bargaining system.

The best procedure to ensure that each party is fully informed of the other party's position is the last offer vote. It will ensure that the parties are informed of each others' positions. It should also force the parties to continue bargaining in some circumstances.

The party requesting the last offer vote would have the opportunity to place its entire proposal before the other side. In the case of the employer it would have the opportunity to place its entire proposal before the membership in the bargaining unit. The bargaining agent would have the opportunity to place its entire proposal before the members of the municipal council. This would ensure that a party's position is fairly and accurately placed before the other party at a critical time in the bargaining process. It is also anticipated that the use of the last offer vote would force the parties to review their positions. In doing so the use of the last offer vote could force an accommodation or compromise between the parties. A party which had decided to force a last offer vote would normally wish to review its position before forcing a vote on its proposal. As well, the possibility of a last offer vote being taken might force the party which is required to take the vote to modify its proposal to the other side. It is anticipated that the last offer vote will become an important weapon in the arsenal of tactics available to the parties.

The Commission envisions a system for the last offer vote which would be similar to that provided by sections 39 and 40 of the *Labour Relations Act* of Ontario. The Ontario legislation provides that the Minister may on his own initiative, any time after the commencement of a strike or lock-out, order a last offer vote of the employees in a bargaining unit. The legislation also provides that the employer may either before or after the commencement of a strike or lock-out make an application to the Minister to have a vote conducted of the employees in the bargaining unit. In the event the employer makes such an application to the Minister, the Minister is required to take a vote. The employer may only request the Minister to take a vote once. In the Commission's opinion the bargaining agent should have the same right to require a last offer vote by a municipal council. This would serve to balance the interests of the parties.

The Commission is of the view that each party should only have the right to require the other to take a last offer vote on one occasion. The parties must perceive the request to take a last offer vote as a serious matter. Only if they take it as such will they be inclined to modify their positions. If the parties could request and could be forced to take a number of last offer votes, the procedure would fail to have any meaning for the parties and any modifications in their position would be minor. The Commission also wishes to state that the right to request a last offer vote should not be conditional on the party requesting the vote to be taken showing that the representatives of the other party have not fairly placed the proposal of the party requesting the vote before their principal. The reason for this is the fact that the parties could become embroiled in a dispute about what was placed before them. This should not become the focus of the parties. Rather, the focus of the parties should be on the issues in dispute.

The Commission wishes to reiterate at this point that this should not be a difficult or onerous procedure for the parties to adjust to. In most circumstances the conciliation officer or the fact finder will have set out the final offers of the parties in their reports. If the parties are still at an impasse after those reports have been filed with the Minister

it is doubtful that many modifications would have to be made to their positions before they could be used as proposals on which the other side would vote during a last offer vote. Any vote accepting the proposal which was subject to a last offer vote is binding upon the party which requested the last offer vote.

It is also the view of the Commission that the parties would take the last offer vote more seriously if, in the event it is rejected, the party requesting the last offer vote could not withdraw the proposal on which the vote was taken for a period of two months or until an agreement were reached whichever occurs first. The party which was required to take the vote would have the option of accepting this proposal or any alternative proposal which the other party placed on the table during this two month period.

The party requesting a last offer vote shall provide to the other party and the Minister a notice requesting a last offer vote and a copy of its last offer. In the event the party requesting the last offer vote is the employer; it shall also provide to the bargaining agent a sufficient number of copies of its last offer for each member of the bargaining unit. The party receiving the notice must take reasonable steps to ensure that those individuals eligible to vote on the offer have reasonable notice of the other party's offer. Failure to do so would constitute bad faith bargaining.

The Minister would be responsible for supervising the last offer vote. In the case of a municipality, as well as the union, the vote would be by secret ballot notwithstanding any provision of the *Municipalities Act* to the contrary. Similarly, the bargaining agent would be required to take a secret vote of the members in the unit.

2. Picketing

Picketing had its origin in the private sector. The purpose of picketing was to induce the public, including fellow workers, not to do business with the employer which was being struck. The public was asked not to purchase the employer's products and

fellow workers were asked not to accept employment from the employer. Eventually, the picket line became a symbol of union solidarity and fellow workers were asked not to cross it. Unions which became effective at picketing could exert considerable economic pressure on an employer. A private sector employer which can neither produce goods for the market place nor sell them if they are produced is under considerable pressure to resolve a bargaining impasse. In *Heather Hill Appliances Ltd. v. McCormack* the court stated the following:

> A long time ago a group of workers who were justifiably unhappy with their lot turned themselves into sandwich-men and (duly placarded) publicly announced their grievances and reprobated their employers by walking up and down the street in front of the premises where they worked. The practice proved effective and fulfilled its purpose, that is, to supply and obtain information; to enlist the sympathy of passers-by; to air grievances; and to criticize the unregenerate Scrooge. Management, of course, resented the making public of its exploitation of labour and, indeed, for many years the Courts held such practices to be wrong. However the right to picket was in due course accepted and it is now firmly entrenched in the common law. In Canada this right has been embodied in the *Criminal Code, 1953-54* (Can.), c.51, s.366(2): ...
>
> As time went on, however, the essential nature of picketing changed. Information is now given through the public prints and received through negotiations. The picket line has become the sign and symbol of trade union solidarity and gradually became a barrier - intangible but none the less real. It has now become a matter of faith and morals and an obligation of conscience not to breach the picket line and this commandment is obeyed not only by fellow employees of the picketers but by all true believers who belong to other trade unions which may have no quarrel at all with the employer who is picketed. This situation is, it would appear, accepted as being palatable in a trade dispute between employer and employee when the strike is legal and the appropriate legislation complied with.[1]

Picketing does not appear to be an effective method of exerting economic pressure on a municipality since a municipality raises its revenues through taxes and grants. Yet, a picket line is a symbol of union solidarity. It has symbolic significance to unions.

[1] *Heather Hill Appliances Ltd. et.al. v McCormack et.al.* 52 D.L.R. (2d) 292-293.

The use of pickets is a legitimate method of conveying information to the public. However, pickets can intimidate many people. The result is that many people do not carry out those activities which they otherwise would, not because of the information which is being communicated to them by the pickets, but because they are apprehensive about crossing a picket line. People should be free to go about their business free from intimidation of any sort. In addition, the union should not attempt to persuade the public not to perform their legal obligations to the municipality. This may include paying taxes, obtaining permits, paying fines and so forth.

The union, with the advent of modern communications has access to a more effective means of communicating its messages to the public than by picketing. The electronic media and daily newspapers are a far better method of communicating the union's messages to the public than picketing. Moreover, altercations and other types of illegal activity which are often associated with picket lines will not distract the public from the union's message. It is unfortunate that it is altercations and other types of activity on the picket line that often ensure media attention. Those factors, however, cannot be used by the union to justify the use of picket lines.

Section 104(1) of the *Industrial Relations Act* provides that picketing may be carried on in the event of a strike or lock-out providing the picketers are not engaging in acts which would otherwise be unlawful. It is clear that picketing is permitted in the private sector in New Brunswick.

The provisions governing provincial government employees are quite different. Section 102(3) of the *Public Service Labour Relations Act* reads as follows:

> Where subsection (1) and subsection (2) are complied with employees may strike and during the continuance of the strike
>
> (a) the employer shall not replace the striking employees or fill their position with any other employee, and

(b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.

Under the *Public Service Labour Relations Act* the employer may not replace striking employees with either their co-workers or replacement personnel. Designation is the only method by which the provincial government may continue to provide services to the public. Since very little economic pressure can be exerted on the provincial government during a strike and the employer is not able to use other employees it is not surprising that picketing is not allowed under the Act. This is a reasonable compromise between the interest of the employer and the interest of the employees which reflects a realistic appraisal of the dynamics of bargaining disputes in the New Brunswick public sector. The dynamics which resulted in this compromise are present in the municipal sector and have application there.

The Commission recommends that in the event the employer uses designated employees to perform essential services that the employees be prohibited from picketing. However, in the event the employer uses other municipal workers, replacement personnel or outside contractors rather than designated employees to deliver municipal services to the public, the union should be permitted to engage in picketing. The Commission believes that this compromise should be acceptable to both the employer and the unions in New Brunswick, notwithstanding the fact that the pickets may still act as an inducement for some members of the public not to perform their legal obligations. The Commission believes that this will not become a significant problem. Moreover the interests of the union must be considered. In most labour disputes picket lines can be effectively monitored and action can generally be taken quickly to ensure that picket lines do not restrict individuals in the exercise of their lawful rights. The Commission is satisfied that this is a necessary accommodation.

3. Bridging The Collective Agreement

The Commission has reviewed sections 1(2), 35(2), 57(3), 75(3), 80(5), and 91(2) of the *Industrial Relations Act*, all which relate to bridging of the collective agreement.

The Commission is of the opinion that legislation should be enacted which provides that the terms and conditions of a collective agreement will be extended in the event that designated personnel are used to provide municipal services to the public. If the employer is to have the benefit of using designated personnel to provide essential services to the public it is only fair and just that the benefits of the last collective agreement should be extended to the bargaining unit. This should provide for a smooth and orderly working relationship. Moreover, the employees in the bargaining unit should not be expected to work in a vacuum. The terms and conditions of the collective agreement should be extended not only to those employees who are working, but also to those who may not be working. All members of the bargaining unit should be treated alike. If this were not done pressures might develop within the bargaining unit which would frustrate the operation of the work place and the negotiations between the parties.

During the public hearings the Commission learned of a number of incidents during strikes and lock-outs when employees were discharged or disciplined but unable to seek a remedy under the collective agreement which had just expired. In general these incidents severely aggravated the bargaining relationship between the parties and in general chilled their relationship. The disputes were serious, prolonged and costly to both sides. Notwithstanding the fact that a lock-out or a strike may be in effect and the employer has decided to provide essential services to the public by using other municipal employees, replacement personnel or by contracting out, the provisions of the collective agreement relating to discharge, discipline, grievance procedures and arbitration should continue to apply. The Commission is of the opinion that the fact that these provisions

do not presently apply during a strike or lock-out has in many cases lead to a deterioration in good labour relations. The Commission is otherwise satisfied with the bridging provisions which are set out in the *Industrial Relations Act*. The Commission recognizes that employees who are on strike or lock-out may have recourse to the provisions of the *Employment Standards Act*. However, the Commission finds that the procedures and remedies available to the parties under the terms of their collective agreements constitute a superior method of resolving disputes between the parties. Moreover, the Commission does not think that the loss of the protection afforded by the collective agreement is a sufficient inducement to the bargaining agent not to proceed with a strike. It is the Commission's opinion that the denial of this right has not significantly contributed to the pressure on the parties to conclude a collective agreement.

In the event the parties select arbitration to resolve their disputes the terms and conditions of the collective agreement should continue to apply. It is the Commission's opinion that this is a fair balance between the interests of the employer and the interests of the employees since the employer is benefiting from the continued work of its employees. The Commission can think of no reason why there should be an interruption in the application of the terms and conditions of employment when the parties have agreed to use arbitration to resolve their dispute.

The Commission is of the opinion that none of the above provisions for the extension of a collective agreement or its sections should interfere with the existing provisions in the Act which provide for the termination of the bargaining relationship between the parties either by agreement or through decertification. There must continue to be provisions which govern the termination of the bargaining relationship between the parties. However, while the relationship exists provisions of the *Industrial Relations Act* should continue to apply which reflect fundamental concepts of fairness and promote a healthy bargaining relationship between the parties.

4. The Procedure In The Event of an Emergency

The *Emergency Measures Act* was enacted to provide civic and provincial authorities with a quick and effective means of responding to emergencies. The intention of the legislation was to provide the appropriate authorities with the power to respond to events which might threaten the "health, safety, or welfare of the civil population"[1]. The events which could threaten the "health, safety, or welfare of the civil population" could arise from natural or man made occurrences. It is clear, however, that this legislation was not intended to be used as a mechanism by which either civic or provincial authorities could terminate an otherwise lawful strike.

The Commission concluded from its review of labour relations in the municipal sector in New Brunswick that some of the parties have acted in an irresponsible fashion. The Commission is of the opinion that it is not inconceivable that a municipality might attempt to use its powers under the *Emergency Measures Act* to terminate an otherwise lawful strike although this has not happened to date.

The Commission is of the opinion that the *Emergency Measures Act* should be clarified so that it is clear that the intention of the legislation is not to terminate an otherwise lawful strike. This could be done by limiting the authority of civic officials to invoke the *Emergency Measures Act* in the event of a perceived threat to the "health, safety, or welfare of the civil population". In the event that an emergency arises during a municipal strike, the responsibility to invoke a "state of local emergency" under the *Emergency Measures Act* should be vested in provincial authorities. The Commission is of the opinion that this would be more appropriate since the provincial authorities would

---

[1] *Emergency Measures Act* s.1

not be a party to the dispute. In any event, the Minister of Labour should be responsible for the administration of labour relations in the province of New Brunswick, not civic authorities.

The Commission would also suggest that the unfair labour practice sections of the *Industrial Relations Act* provide that in the event a municipality acts in a manner so as to abuse the intent of the *Emergency Measures Act*, the bargaining agent or union could make a complaint against the municipality. On receipt of such complaint, the Board, upon making a determination that the municipality had engaged in an unfair bargaining practice, could impose an appropriate sanction.

The *Emergency Measures Act* does not contemplate the effect of a declaration of an "emergency" on a lawful strike or lock-out. It is the Commission's opinion that the legislation should be amended in order to provide for the smooth functioning of the labour relations system. This could be done by enacting legislation which would require the appropriate authorities to make a declaration that an emergency has ended, providing that the strike or lock-out may resume immediately and, in the event designated employees have been used to provide essential services to the public, ensure that the strike may be resumed seventy-two hours after the bargaining agent has supplied the employer with a list of designated personnel who will provide those services which have been designated as essential to the "health, safety or security of the public". This will allow for the orderly resumption of the strike after the termination of the emergency.

PART 7 ADMINISTRATION OF THE COLLECTIVE AGREEMENT

I. THE FRAMEWORK FOR THE ADMINISTRATION OF THE COLLECTIVE AGREEMENT

The negotiation and execution of a collective agreement is followed by the administration of the collective agreement. Good bargaining and a good collective agreement set the stage for a healthy relationship between the employer and the employees. This will only come to fruition, however, if the parties adopt positive attitudes and practices in the implementation of their collective agreement. The good administration of a collective agreement will also produce a favorable atmosphere for subsequent negotiations.

The good administration of the collective agreement is characterized by good communications between the parties and an understanding of the parameters within which accommodations and compromises may be reached. The parties must also know the limits of their expectations. By fostering good communications during the term of a collective agreement and using this opportunity to understand the collective bargaining goals of the other party bargaining may be approached with a better sense of purpose and direction.

Section 53(1) of the *Industrial Relations Act* states the following:

> Every collective agreement shall provide that there shall be no strikes or lock-outs so long as the agreement continues to operate.

Section 55(1) of the Act compliments section 53(1). The section reads as follows:

> Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The effect of these sections is to ensure that there are no strikes or lock-outs during the term of a collective agreement and that a method is available to the parties to resolve

their disputes. While the parties may not opt out of the no strike/no lock-out section of the Act they are permitted the freedom to mutually agree on a method or methods for resolving their disputes. However, if they cannot agree on a method they will be forced to use the arbitration provision in the Act.

Basically, there are two approaches to resolving disputes during the term of a collective agreement. One involves accommodation and compromise. This approach is manifested by labour management committees and grievance mediation. The other involves a final determination by a third party. It is usually manifested by various types of arbitration.

A. LABOUR MANAGEMENT COMMITTEES

The purpose of the labour management committee is to provide a forum where the parties may develop good communications. By establishing a labour management committee the parties in effect formalize and institutionalize the communications between them. The Commission is of the opinion that good communications are essential to a good relationship between the parties. The commitment to the establishment and utilization of labour management committees represents a commitment to good communications by the parties. In addition, the commitment to labour management committees also represents a commitment to the principles of accommodation and compromise.

The key feature of the labour management committee is the fact that it provides the parties with the opportunity to find solutions to their problems which are acceptable to both parties. The process by which the parties attempt to find mutually acceptable solutions to their problems cannot be underestimated. It is acknowledged that in many cases the parties will not be able to find mutually acceptable solutions. However, the use of labour management committees to attempt to find a mutually acceptable solution should nevertheless be beneficial. Indeed, even if solutions are not found which are

acceptable to both parties the process may still result in a solution which is more acceptable to the parties than would otherwise have been the case.

The labour management committee can serve a variety of uses. One of the most appropriate uses of the labour management committee is to resolve potential disputes. Once it is perceived that a problem exists, the parties can refer the matter to the labour management committee to try to resolve it. By following this approach the parties have the opportunity to attempt to resolve a problem before one side is adversely affected by it and before the parties become committed to a position. The labour management committee provides the parties with the opportunity to explore the solutions to a problem at a time when the parties should be most flexible. The labour management committee can also be used by the parties to resolve disputes which may arise because of omissions or ambiguities in the collective agreement. The parties are in the best position to resolve disputes which arise as a result of problems of this sort. They were at the bargaining table and should be best able to appreciate what the intentions were at the time and give effect to them. It is far better that the parties resolve these issues on their own than that they submit them to an arbitrator who will be extremely limited in his search for a solution to the problems of the parties. The labour management committee can also be used as a forum in which the parties state and clarify their positions on matters of concern to them. A broad range of issues may be discussed. The issues may concern methods of production, personnel problems, office procedures, training programs or anything else which concerns the parties. It must be recognized that the interests which are of concern to the parties extend well beyond those which are dealt with in the collective agreement.

The labour management committee should be beneficial to both parties. The employer can expect to benefit from the opportunity to consult with employees in a meaningful way when considering changes in the workplace. By doing so the employer can expect to avoid problems which might otherwise arise. The process of consultation

should not be viewed by the employer as a restriction on management rights. Rather, it should be viewed as an opportunity for consultation in which mutually acceptable solutions can be found. Management always has the right to make the final decision if that right has not been restricted by the collective agreement. Nothing can ever be lost by consulting with the union within the context of the labour management committee. Indeed, a municipality which commits its time and resources to a labour management committee will devote far less time to the grievance arbitration process. The result will be better and more acceptable solutions arrived at in an atmosphere of mutual co-operation.

Municipal employees may expect to benefit from the access labour management committees will give them to senior management personnel. They will have the opportunity to address senior management on matters of concern and will be present when these matters are brought to senior management's attention. Most municipal employees would not have an appropriate forum in which to do this outside of the labour management committee. In addition, by committing time and resources to the labour management committee, municipal unions can also expect to commit less time and money to the grievance arbitration process.

The employer and the union must each be committed to the labour management committee if it is to function properly. The employer's and the union's commitment to the labour management committee must involve the appointment of senior personnel to the committee. This involves a recognition by both parties that the labour management committee is important. This in itself is important because it appears to the Commission that very often the employer has not given its labour management relations the priority which it requires. The labour management committee must be recognized as being

beneficial to both parties. Therefore, it is the Commission's opinion that labour management committees should have an equal number of employer and union representatives. The representatives of the two parties should alternate as Chairman of the committee. The committee must also hold regular meetings in order to ensure good communication between the parties. The Commission does not think that labour management committees can function effectively if they do not meet on a regular basis. It must be remembered that one of the prime functions of the labour management committee is to ensure that potential problems are recognized and dealt with. Otherwise, there is the danger that the committee will only be used for crisis management.

The Commission recommends that provisions to establish labour management committees be included in the collective agreements of the parties.

It appears to the Commission that some municipalities and unions have not used labour management committees because they do not understand them and are not aware of how they operate. The Commission therefore recommends that the parties seek the assistance of the Industrial Relations Branch of the Department of Labour to assist them in establishsing and using labour management committees.

B. GRIEVANCE MEDIATION

Grievance mediation is becoming an increasingly popular method of resolving disputes during the term of a collective agreement. Where the parties cannot resolve their disputes, they may proceed to arbitration. Grievance mediation is based on the principles of voluntariness, mutuality, and accommodation and compromise. Voluntariness is an important feature of the system. This means that the parties are free to select grievance mediation as a method of resolving their disputes. It cannot be forced on either party. This is important because it is generally acknowledged that those systems which work best in the labour relations context are those which are mutually acceptable to the parties. In addition, the fact that the system is voluntary means that the parties

will only use it when it is most appropriate. The principle of mutuality is also an important feature of the system. In grievance mediation, the neutral third party examines the problem to find a mutual basis for resolution. The focus is not, as with arbitration, on the issues which polarize the parties. Rather, it is on those issues which could bring the parties together. The principles of accommodation and compromise are also important features of the system. Grievance mediation responds to the complex problems in the relationship between the parties. If disputes are to be resolved the system which the parties adopt must be flexible. Grievance mediation is far more flexible than arbitration. The principles of accommodation and compromise, which must be utilized by the parties during the grievance mediation process, if the system is going to work, requires that the parties work together in order to achieve an acceptable solution to their dispute. By agreeing to use the grievance mediation system the parties are acknowleding that they have mutual interests which are more important than those interests which are solely of concern to one of the parties.

The principles underlying grievance mediation constitute in themselves advantages of the grievance mediation system over arbitration. In addition grievance mediation also has a number of other advantages over arbitration:

(a) the parties can address the "cause" of the problem,

(b) the parties are not placed in a win-all, loose-all situation,

(c) the process is speedier,

(d) the process costs less,

(e) the parties develop a better working relationship.

In grievance mediation the parties can address the cause of the dispute. With arbitration a third party can resolve the dispute, however, the arbitrator's jurisdiction is restricted by the legislation, the collective agreement and the parties' submissions. As a result, the arbitrator may not be able to resolve the cause of the dispute which is before him. A good system of grievance mediation gives the parties the opportunity to resolve

the causes of their disputes. Grievance mediation also has the advantage of providing the parties with a mechanism whereby they may adjust their disputes. The parties are not confronted by a win-all, loose-all situation. The Commission is of the opinion that the labour relations between the parties will have a better opportunity to grow in a positive direction when each party benefits, however slightly, from the amicable resolution of a dispute. Speed and efficiency are additional advantages of the grievance mediation system. It is generally acknowledged that it does not take as long to resolve disputes using grievance mediation. In addition, the process is more informal and the parties tend to feel more comfortable handling grievance mediation on their own. Consequently, solicitors are not retained to represent the parties and it is not necessary to pay an arbitrator. Grievance mediation imposes less of a financial burden to the parties. The final advantage of the grievance mediation system is the fact that it contributes to a better working relationship between the parties. It is generally acknowledged that a system of dispute resolution which provides for accommodation and compromise between the parties is a better system for resolving disputes than one in which a third party makes the decision.

Grievance mediation systems are working well in other jurisdictions in Canada. For example, in British Columbia grievance mediation officers settle approximately sixty-six percent of the cases to which they are assigned.[1] Similarly, grievance mediation officers in Ontario report a settlement rate of between seventy and eighty percent.[2] The experiences of British Columbia and Ontario indicate that the system certainly merits the attention of the parties.

---

[1] Labour Relations Board of British Columbia, Annual Report (Victoria: Province of British Columbia, 1983) 58.
[2] Ontario Ministry of Labour, Annual Report (Toronto: Province of Ontario, 1983-1984, 1984-1985) 10, 11, respectively.

In New Brunswick the Department of Labour has offered a voluntary grievance mediation service for several years. The statutory authority for this service is found in section 71 of the *Industrial Relations Act*. In practice the Minister appoints a grievance mediation officer when he receives a joint application from the parties to do so. The officer is appointed from the conciliation staff of the Industrial Relations Branch of the Department of Labour. Following his appointment, the officer arranges a meeting with the parties for the purpose of resolving the issues in dispute.

It is interesting to note that the Department of Labour has been able to implement the grievance mediation service using its existing staff. This has been possible because the officers have been able to schedule their mediation work in conjunction with their duties as conciliators. Grievance mediation meetings are arranged in various areas of the province to coincide with conciliation duties in a particular area of the province. This has been very beneficial in that the Department of Labour has not incurred any significant additional expenditures to operate the program and at the same time the parties have not been required to pay for grievance mediation services.

In the Commission's view the grievance mediation services offered by the Department of Labour have been underutilized in the municipal sector. There are two reasons for this. The first is that some of the parties are not aware of the existence of the program, notwithstanding, the efforts of the Department of Labour to make them aware of the program. The second is that although some parties may be aware of the existence of the program they do not fully understand it. The parties appear to be reluctant to become involed in a program which they do not fully understand and are not familiar with.

The Department of Labour should take additional steps to ensure that the parties become aware of and fully understand grievance mediation and the program available to them through the Department of Labour. The Department's education program should

be highlighted after each series of municipal elections in the province and thereafter on an ongoing basis.

The Commission also recommends that employers and unions in the municipal sector work together to develop their own grievance mediation programs. This should result in substantial improvements in labour relations in the municipal sector.

C. TRADITIONAL GRIEVANCE ARBITRATION

In Canada, the parties to a collective agreement must maintain labour peace during the term of a collective agreement. Federal labour legislation and all provincial labour legislation,[1] except that in Saskatchewan,[2] provides that the parties to a collective agreement shall resolve their disputes during the term of a collective agreement either by "arbitration" or "arbitration or otherwise". Section 55(1) of the New Brunswick *Industrial Relations Act* provides the following:

> Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The legislation gives the Board the power to supervise the arbitration provisions in the collective agreement. Section 55(4) of the Act reads as follows:

> Where, in the opinion of the Board, any part of the arbitration provisions in a collective bargaining agreement, including the method of appointment of the arbitrator or arbitration board, is inadequate, or the provisions set out in subsection (2) are unsuitable in any particular case, the Board, on the application of a party to the collective agreement, may modify any such provision in such manner as not to conflict with subsection (1), but, until so modified, the arbitration provision in the collective agreement or in subsection (2), as the case may be, applies.

---

[1] Alberta *Labour Act* s.118, British Columbia *Labour Code* s.93, Canada *Labour Code* s.155, Manitoba *Labour Relations Act* s.69, Newfoundland *Labour Relations Act* s.83, Nova Scotia *Trade Union Act* s.40, Ontario *Labour Relations Act* s.44, Prince Edward Island *Labour Act* s.36, Quebec *Labour Code* s.100.

[2] Saskatchewan *Trade Union Act* s.25

The fact that the legislation requires the parties to resolve their disputes by "arbitration or otherwise" and that the Board is given the power to supervise the arbitration provisions in collective agreements is indicative of the importance which the peaceful resolution of disputes during the term of a collective agreement has in labour relations policy.

The legislation affords the parties considerable discretion in determining the methods which they will use to resolve their disputes during the term of a collective agreement. While they must use arbitration if they cannot agree on any other method of resolving their disputes the parties are not restricted in the method or methods of arbitration which they may adopt to resolve their disputes. The parties may choose one or three-member boards, vary the procedures to accommodate their needs in any given dispute and they may use the decision as a precedent or not. In New Brunswick, the parties have generally not shown much inclination to experiment with arbitration. The parties have generally used what is referred to as the traditional grievance arbitration system modelled after the provision in the legislation. This is unfortunate because it is the Commission's opinion that the traditional grievance arbitration system is not the most appropriate method in all circumstances.

The legislation governing arbitration during the term of a collective agreement does not specify whether the parties shall use a single arbitrator or a three-member arbitration board to resolve their disputes. If the parties do not include an arbitration provision within their collective agreement, section 55(2) of the *Industrial Relations Act* provides that the arbitration provision set out therein will be deemed to be part of every collective agreement negotiated between the parties. That provision specifically sets out the procedure for the appointment of a three-member arbitration board. Even if this provision is not deemed to be part of the collective agreements between the parties, the fact is that the parties often adopt it since they find it convenient to model provisions in their collective agreements after the statutory provisions. Consequently, most collective

agreements in the private sector in New Brunswick provide for arbitration by three-member arbitration boards.

The Commission is of the opinion that disputes which arise during the term of a collective agreement should be resolved by a single arbitrator. Originally, arbitration boards were composed of three independent persons. Today arbitration boards are composed of an independent chairman and a representative of each of the parties. Rights arbitration is an adjudicative process. It is not a process which is based on accommodation and compromise. Another problem with three-member arbitration boards is the fact that they cost more and there is a greater potential for delays in obtaining decisions. By using single arbitrators instead of three-member arbitration boards to resolve their differences the parties could save themselves considerable expense and obtain more timely awards. Another problem with three-member arbitration boards is the fact that there is always the possibility of a dissenting opinion. This tends to undermine confidence in the arbitration system. In addition, section 55(2) of the Act provides that a majority decision is the decision of the arbitration board or, if there is no majority, the decision of the chairman is the decision of the arbitration board. It is worth noting that section 95(1) of the *Public Service Labour Relations Act* provides that unless an arbitrator has been named in the collective agreement between the parties, that a single arbitrator shall be used to resolve disputes unless the employee requests and the employer does not object to the appointment of a three-member arbitration board by the Public Service Labour Relations Board.

Section 73(2) of the *Industrial Relations Act* provides that in the event of the failure to appoint an arbitrator under a collective agreement that the Minister upon the request of either party may make the appointment. This section is most often utilized when the nominees of the parties to an arbitration board are unable to agree on the appointment of a chairman. The Commission is of the opinion that if the nominees of the parties cannot reach an agreement on the choice of an independent chairman they

have demonstrated an inability to perform their function. The Commission recommends that in the event the parties fail to nominate an independent chairman within the time frame specified in the collective agreement or in the deemed arbitration provision of section 55(2) of the Act,that the Minister should dismiss the nominees of the parties and appoint a single arbitrator to hear the case from the list of registered arbitrators.[1] The Commission is of the opinion that a provision such as this would put pressure on the nominees of the parties to agree on an independent chairman or face the alternative of being dismissed.

The Commission also recommends that the statutory arbitration provision in the legislation be amended to provide for the resolution of disputes during the term of a collective agreement by single arbitrators. This should be the method provided under the legislation and the method which the parties must be required to use in the event they are unable to agree on the appointment of a chairman.

An arbitrator's powers are set out under section 76(1) of the *Industrial Relations Act*. Basically, the section provides that an arbitrator may determine the rules of procedure and evidence which will be applicable during a hearing. Accordingly, an arbitrator is given considerable flexibility in fashioning the rules of procedure and evidence to reflect the demands of the case before him.

In New Brunswick the arbitrators and the parties in the municipal sector have been content to use the traditional grievance arbitration system to resolve their disputes during the term of a collective agreement. This system uses rules of procedure and evidence which parallels those in a civil action. Each party is entitled to present its case. The parties are given the opportunity to examine, cross-examine and re-examine witnesses.

[1] The system for the registration of arbitrators is outlined on page 142.

The rules of evidence are basically the same although it is common for an arbitrator to accept evidence which normally would not be admitted in a civil action. The arbitrator may render his decision once the parties have concluded their case or he may reserve his decision until a future date.

The legislation governing arbitration does not set out any guidelines respecting hearings. As a result, there are no rules regarding prehearing disclosure. Although prehearing disclosure would not be necessary in many cases, it could be beneficial to the parties in some cases, including suspension and discharge cases. This view has also been expressed by the Public Service Labour Relations Board.[1] The Commission therefore recommends that the legislation be amended to provide a framework for prehearing disclosure in suspension and discharge cases. This should not be available to the parties in every case. The system envisaged should be relatively informal and every effort should be made to ensure that the cost of the system does not become a burden on the parties. The cost of arbitration would increase if it were available to the parties in every case.

One of the important features of conventional grievance arbitration is that it allows the parties to present their case before an impartial third party. This procedure allows the parties to present all the facts before an impartial arbitrator who will render a decision according to the collective agreement. This can be beneficial to the parties because it ensures that problems will not go unresolved which would frustrate their relationship. The process can also have a sobering effect on the future behavior of the parties.

---

[1] Public Service Labour Relations Board, Sixteenth Annual Report (Fredericton: Province of New Brunswick, 1985) 4.

The traditional grievance arbitration system has not only been used to resolve disputes between the parties but also to provide guidelines as to how the parties should conduct themselves in the future. This is known as the precedential value of traditional grievance arbitration. While it is generally acknowledged that an arbitrator should only decide the issues before him the reasoning that an arbitrator provides in his decision may provide an indication as to how future disputes can be expected to be decided. As a result, an arbitrator's decision can be used as a guideline for future conduct. This is important because the award of the arbitrator may in itself prevent future disputes from erupting.

D. THE COMMISSIONER FORM OF ARBITRATION

One of the criticisms of the traditional grievance arbitration system is that it has become time consuming and costly. In an effort to respond to these problems the parties in some jurisdictions have developed a commissioner system of arbitration. The system is intended to provide the parties with a decision on the merits in a timely, expeditious and efficient manner.

The commissioner system of arbitration can be used effectively to decide a single grievance. However, it can be used even more effectively when several grievances are set down for determination before a commissioner arbitrator on the same day. This has the advantage of reducing the costs which are associated with arbitration.

The commissioner system of arbitration is primarily a dispute resolution mechanism. The parties are not as concerned with the reasons for the decision as they are with the decision itself. Indeed, the reasons for the decision that is made by the commissioner arbitrator may be very brief. Consequently, the commissioner arbitrator's decision cannot be used by the parties to establish precedent. This is a clear advantage to the parties when the dispute is a minor one and there would be very little justification for devoting considerable time and energy to a full hearing with extensive reasons. The fact that the

arbitrator's decision does not constitute a precedent which would be used to guide future arbitrators means that the parties are satisfied to use the abbreviated form of arbitration to resolve minor disputes. The commissioner system of arbitration has been used by the International Nickel Company of Canada Limited and the United Steel Workers of America effectively.[1] It has not been used extensively in New Brunswick although Brunswick Mining and Smelting Corporation Limited and their unionized employees have used the system.

The Commission is of the opinion that this system could be used effectively for certain types of disputes in the municipal sector in New Brunswick. Many municipal sector employers are relatively small and the bargaining units within those municipalities are also relatively small. Very often the expense of a full arbitration hearing results in an onerous burden on the parties. The Commission thinks that the commissioner system of arbitration could be used effectively by the parties to resolve many of their minor disputes with considerable savings.

Alton W. J. Craig, in his book *The System of Industrial Relations in Canada*, has reviewed the procedure applicable to the commissioner system of arbitration.[2] He states the following:

> The Grievance Commissioner procedure is a very informal one. Not less than ten days prior to the hearing, the Commissioner is provided with a copy of the grievance, a written summary of the stage-two grievance meeting which outlines the facts agreed to, the facts in dispute, the union's position, the company's position and a copy of the written decision of the management representative at stages two and three of the grievance procedure. In addition, the parties supply brief written arguments supporting their position. The purpose of the hearing is solely to clarify issues or facts in dispute. Usually, no witnesses are called and the written material generally serves as the basis of a decision, although the parties may make further representations or present such evidence as the commissioner may permit or require. There is, however, no obligation to conform to strict rules of evidence. A written

[1] Alton W. J. Craig, *The System of Industrial Relations in Canada*. (Scarborough, Ontario: Prentice-Hall Canada Inc., 1983) p. 219.
[2] Ibid.

> decision must be rendered within seven days of the hearing. Brief reasons for the award accompany it but they do not form part of the award itself. Also the parties have agreed that decisions in the Grievance Commissioner procedure will establish no legal precedence.

The Commission is of the opinion that the procedures outlined by Mr. Craig would be appropriate for adoption by the parties in the municipal sector in New Brunswick with some minor modifications.

In the event the parties decide to use the commissioner system of arbitration they should be required to select a commissioner within five days of agreeing to refer a dispute to a commissioner. If they are unable to agree on the appointment of a commissioner, either party could apply to the Minister who would make the appointment within five days of receiving the application. The Minister would be required to appoint the commissioner from the list of registered arbitrators. The commissioner would be required within five days of the date of his appointment to set a date for a hearing, unless the parties otherwise agreed. The hearing would be held within twenty days of the commissioner's appointment. Five days before the date of the hearing the parties would be required to provide the commissioner with a copy of the grievance and the replies filed at each stage of the grievance process. In addition, the parties would be required to exchange and to provide to the commissioner a statement outlining the facts and arguments on which they intend to rely to support their position. The commissioner would be required to render his decision within a period of ten days from the date of the hearing. The commissioner would be entitled to give brief reasons for his award but these would not constitute part of the award.

E. THE EXPEDITED ARBITRATION SYSTEM

Expedited arbitration is becoming increasingly popular in Canada. It is presently used in British Columbia, Manitoba and Ontario.[1]

[1] British Columbia *Labour Code* s.96, Manitoba *Labour Relations Act* s.113, Ontario *Labour Relations Act* s.45.

The purpose of expedited arbitration is to provide the parties with a procedure whereby they may proceed through the grievance procedures, mediation and arbitration within an abbreviated time frame. Consequently, the parties are able to resolve their disputes in a timely and efficient manner. This is in the best long term interest of the parties.

In the expedited arbitration system envisaged by the Commission the parties could have recourse to it, notwithstanding, anything in their collective agreement to the contrary. In order to invoke the system the parties would have to make an application to the Minister for the appointment of an arbitrator. The Minister, upon receiving the application, would appoint a single arbitrator to hear the case. The arbitrator would be required to hold a hearing within thirty days from the date on which the application was received by the Minister. He would be required to render his award within ten days of the conclusion of the hearings.

The integrity of the collective agreements negotiated between the parties should be maintained. Therefore, it is the Commission's opinion that the parties should not have recourse to the expedited arbitration provisions of the statute unless they jointly agree to use them. At the same time the Commission is of the opinion that an exception should be made for suspension and discharge cases. In those cases either party should have the option of making an application to the Minister to envoke the expedited arbitration provisions of the legislation. This is because the situation often becomes very aggravated in these types of cases and the relationship between the parties can become extremely difficult if the dispute is allowed to linger. Moreover, as time passes, the parties become entrenched as either party has more to gain or lose as a result of the passage of time. The relationship of the parties can therefore be preserved by ensuring that they have recourse to a quick and efficient decision-making process.

The Minister would play an important role in the effective operation of the system. It is the Minister who is responsible for the appointment of the grievance mediation officer. It is anticipated that in most cases the grievance mediation officer would be a member of the staff of the Industrial Relations Branch of the Department of Labour. In addition, it is the Minister who appoints the single arbitrator from the list of registered arbitrators. He is responsible for co-ordinating the system and ensuring that the arbitration hearing is held within thirty days of the date on which he receives the application to envoke the system.

It is generally acknowledged that one of the best methods of applying pressure on the parties to resolve their disputes is to confront them with the uncertainty of the future. The parties are comfortable and assured when they are dealing with a system which they know and have had experience with. They also become comfortable with certain familiar personalities. In the expedited arbitration system envisaged by the Commission the Minister would appoint the arbitrator and establish the date for the hearing in consultation with the arbitrator and the parties. However, the Minister would not disclose the name of the arbitrator to the parties until the date of the hearing. This would create some uncertainty for the parties and may have the effect of forcing them to resolve their dispute on their own.

Another important feature of the system is that an application for the appointment of an arbitrator under the expedited arbitration provisions of the legislation would automatically activate the grievance mediation program which is offered by the Industrial Relations Branch of the Department of Labour. The mediator would consult with the parties and determine whether or not the dispute can be resolved by mediation. He would be required to notify the Minister where the dispute was successfully resolved.

An arbitrator appointed pursuant to the expedited arbitration provisions of the legislation would have all the powers of an arbitrator under section 76 of the Act. It

should also be noted that the arbitrator would conduct the hearing as in the traditional grievance arbitration system.

II. ILLEGAL STRIKES AND LOCK-OUTS WHILE COLLECTIVE AGREEMENT PROVISIONS IN EFFECT

A. ILLEGAL STRIKES AND LOCK-OUTS

Early Canadian labour legislation established the principle that disputes between the parties during the term of a collective agreement were to be resolved in a peaceful manner. This precluded the parties from resorting to economic sanctions to resolve their disputes during the term of a collective agreement. This has since become a fundamental principle of labour relations law in Canada. Indeed, this principle is enshrined in sections 53 and 91 of the *Industrial Relations Act*.

The importance of the principle cannot be understated. A large sector of the Canadian economy is now unionized. The economy cannot prosper if it is plagued by strikes and lock-outs. The principle that the parties must resolve their differences during the term of a collective agreement in a peaceful manner helps to ensure the prosperity of the Canadian economy. The principle takes on added importance when considered in the context of the municipal sector. As noted previously, municipalities provide many services to their citizens which may be considered as essential for the "health, safety or security of the public". Therefore, the principle is important not only because of its economic implications but also because of its implications to the social well-being of Canadians.

Illegal strikes and lock-outs are a threat to the economy and to the "health, safety or security of the public". In addition, they undermine public confidence in the labour relations system and respect for the law. The public interest demands that the integrity of the collective bargaining system be preserved and that respect for the law be maintained.

Municipalities and unions are institutions. Canadians expect their institutions to exercise leadership within their communities. In addition, municipalities and unions have considerable economic and political power within their communities. Municipalities and unions should therefore be expected to act in a responsible manner at all times. Unfortunately, this has not always been the case. Municipalities and unions have often asserted their own goals and objectives in a manner which is inconsistent with their responsibilities in the community and in violation of the Act. The Commission is of the opinion that reforms must be adopted which will affirm the principle that the parties must resolve their differences during the term of a collective agreement in a peaceful manner and ensure that the parties conduct themselves in a manner which is consistent with their obligations to the public and under the Act.

For purposees of this section of the report illegal strikes or lock-outs are those which take place when the terms of a collective agreement are still in force.

The existing sanctions for illegal strikes include: prosecutions under the Criminal Code, prosecutions under labour relations statutes, court actions for damages, court orders for injunctions, and grievance arbitration. While criminal prosecutions may be available, they are ineffective and seldom used. Prosecutions under labour relations statutes fall into the same category. They are ineffective and seldom used. A civil action for damages is generally used to justify securing an interim injunction to stop the strike. The actions are seldom pursued to judgment. The injunction although usually an ancillary remedy has become the principal tool for employers to stop illegal strikes. Grievance arbitration has not been used to any degree to resolve illegal strikes and lockouts.

The Commission is of the opinion that if illegal strikes and lock-outs are going to be effectively dealt with there must be:

(a) an appropriate forum in which to deal with illegal strikes and lock-outs,

(b) an effective and speedy remedy to deal with illegal activity,

(c) a mechanism by which responsibility can be imposed on the parties in the event of illegal activity.

The Commission is recommending a number of reforms in order to ensure that these objectives are accomplished by the legislation.

The Commission is of the opinion that the most appropriate forum to deal with illegal strikes and lock-outs in the municipal sector is the Board. As the Supreme Court of Canada stated in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, per Dickson J.,

> The Labour Board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a Board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.[1]

It is significant that the Supreme Court of Canada has acknowledged the specialized role of labour boards. Moreover, the labour movement has always been uncomfortable with judicial proceedings. They have always expressed their preference to have labour matters decided by a tribunal other than the court. The Commission is of the opinion that the Board, because it is composed of members representing the parties, is better suited than the courts to determine matters between employers and employees. Moreover, because labour boards deal with labour relations matters on a continuous basis they acquire an expertise which it is difficult for the courts to match. This has already been recognized in British Columbia, at the federal level, in Nova Scotia, Ontario and Saskatchewan.[2]

---

[1] *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1980), 97 D.L.R. (3d) 417 p. 424.

[2] British Columbia *Labour Code* s.28, Canada *Labour Code* s.182, Nova Scotia *Trade Union Act* s.49, Ontario *Labour Relations Act* s.92, Saskatchewan *Trade Union Act* s.11.

The Commission is of the opinion that this should also be recognized in New Brunswick and that the powers of the Board should be expanded in order to provide it with appropriate remedies in the event of an illegal strike or lock-out. Section 102 of the *Industrial Relations Act* reads as follows:

> 102(1) Where a trade union or a council of trade unions calls or authorizes a strike, or employees engage in a strike, that the employer or employers' organization concerned alleges was or is unlawful, the employer or employers' organization may apply to the Board for a declaration that the strike was or is unlawful, and the Board may make such declaration.
>
> 102(2) Where an employer or employers' organization calls or authorizes a lock-out that any of the employees of the trade union or the council of trade unions concerned alleges was or is unlawful, any of the employees or the trade union of the council of trade unions may apply to the Board for a declaration that the lock-out was or is unlawful, and the Board may make such declaration.
>
> 102(3) A declaration made under this section does not affect any proceeding in any court or any proceeding under the provision of a collective agreement, where the question of a lawful or unlawful strike or a lawful or unlawful lock-out, as may be the case, is in issue.

It is clear that the Board already has the power to declare a strike or lock-out illegal. However, the Board does not have the power to issue affirmative or negative orders to force the parties to stop the illegal action. This would appear to be one of the shortcomings of the legislation. The Commission is of the opinion that this shortcoming should be rectified.

The most effective procedure which is available to the parties at the present time is the injunction. Section 34(2) of the *Judicature Act* was enacted to curtail its use to stop illegal strikes. It reads as follows:

> 34(2) No *ex parte* injunction shall be granted unless the court or judge is satisfied that
>
> (a) a breach of the peace, injury to the person or damage to property has occurred and is likely to be continued, and
>
> (b) reasonable notification, by telephone or otherwise, of the application has been given by the applicant at the earliest possible time to any person or labour organization sought to be restrained, or that notification could not reasonably have been given.

The clear purpose of section 34(2) of the Act is to prevent a party from obtaining an *ex parte* injunction unless a judge is satisfied that there is a likelihood of a breach of the peace, personal injury or property damage. The section was not intended to be used as a method of stopping illegal strikes or lock-outs. This is consistent with Canadian jurisprudence which frowns on the use of prior restraints. While the Commission understands this position it is of the view that the law must be reformed in order to deal effectively with illegal strikes and lock-outs.

The Commission acknowledges that applicants for injunctions have been able to circumvent the provisions of section 34(2) of the *Judicature Act* by making an interlocutory application for an interim injunction under section 33 of the *Judicature Act*. The procedure is to commence an action and then to make an interlocutory application and at the same time request the court to abridge the time limits which would otherwise apply. In this way employers have been able to effectively nullify the intent of section 34(2) of the *Judicature Act*. In theory the party receiving the order is required to proceed with its action to a conclusion. However, in practice very few actions ever proceed to trial. In the Commission's opinion the procedure that has developed is not satisfactory.

It is the Commission's view that the jurisdiction to deal with an illegal strike or lock-out should be vested in the Board by empowering it to use cease and desist orders. The right to apply to the court for an injunction respecting an illegal strike or lock-out should be removed where the dispute involves a certified bargaining agent and a municipal employer.

The constitutional jurisdiction of the provinces to confer labour boards with the power to issue cease and desist orders was affirmed in *C.U.P.E. v Guelph General Hospi-*

tal.[1] It is becoming more common to confer this power on labour boards. Indeed, British Columbia, the Federal Government, Nova Scotia, Ontario and Saskatchewan have already done so.[2]

It is the Commission's opinion that the Board should have the power to issue a cease and desist order. However, the Commission is also of the opinion that there should be recourse to the courts to enforce a cease and desist order. The Commission is of the opinion that it is more appropriate for the Attorney General and the courts to be entrusted with the power of enforcing cease and desist orders once they are given rather than leaving it to the whim of the parties. Therefore, the Attorney General should have the authority to commence a prosecution in the event a party fails to comply with a cease and desist order made by the Board.

The Commission also recommends that where the Board has the power to issue a cease and desist order the power of the courts to issue injunctions for the same cause should be removed.[3]

The Commission is of the opinion that the parties must accept the responsibility for illegal strikes and lock-outs. The municipality and the union are institutions. The municipality represents a level of government. The union, as a result of certification, is given the right to represent the interests of the municipality's employees. Each must be accountable to the public.

---

[1] *C.U.P.E. v Guelph General Hospital* (1978), 22 O.R. (2d) 348

[2] British Columbia *Labour Code* s.28, Canada *Labour Code* s.182, Nova Scotia *Trade Union Act* section 49, Ontario *Labour Relations Act* s.92, Saskatchewan *Trade Union Act* s.11.

[3] The Alberta Labour Relations Act, s.112(1), states "Notwithstanding anything in this Act, the *Judicature Act* or any other Act, when there is a strike or lock-out no injunction before trial shall be granted *ex parte* to (a) a party to the dispute, or (b) any other person or party, to restrain a party to the strike or lock-out from doing any act in connection with the strike or lock-out."

The Commission recommends that the legislation be amended to provide that the employer before engaging in a lock-out must file with the Board a certificate certifying that the municipal council has authorized a lock-out. It also recommends that before a union be authorized to engage in a strike that it be required to file a certificate with the Board certifying that it has authorized a strike. An employer could not be able to engage in a legal lock-out, and a union could not be able to engage in a legal strike without first filing the appropriate certificate. This would help to ensure that the parties accept the responsibility for their actions. Unless the appropriate certificate was filed before the strike or lock-out, such strike or lock-out is to be deemed illegal.

B. PROCEDURES

The Commission is of the opinion that in the event of a strike or lock-out, if the party engaging in the activity has not filed a certificate of authorization the other party may apply *ex parte* to the chairman or vice-chairman of the Board for a cease and desist order. Upon being satisfied that the party engaging in the strike or lock-out has failed to file a certificate of authorization the chairman or vice-chairman may issue a cease and desist order forthwith. The order shall be served upon the party engaging in the activity and a copy forwarded to the Attorney General so he can institute enforcement proceedings if it is not obeyed.

It is recognized that illegal strikes can occur without the authorization or sanction of a union. Yet, the union in a collective agreement has agreed that there will be no illegal strike.

While the employer may obtain a cease and desist order he should also be able to count on the responsibility of the union to take steps to terminate the illegal action.

The Commission is of the opinion that steps must be taken to ensure that unions exercise the responsibility they have been given by the *Industrial Relations Act* to represent the members of a bargaining unit. The Commission recommends if a strike has not been authorized by the union the employer may serve the union with a notice that the employees are engaging in an illegal strike and requesting the union to take all reasonable steps to ensure that the members of the bargaining unit return to work. The notice shall not prevent the employer from making an application to the Board for a cease and desist order. If the members of the bargaining unit do not return to work within twenty-four hours the union shall thereafter be deemed to have authorized the strike in all proceedings subsequent unless the union establishes that it took all reasonable measures in the circumstances to ensure that their members returned to work.

Where a strike or lock-out authorization has been filed by the party but the other party believes the strike or lock-out to be illegal it may make an application for an interim cease and desist order. Such application may be made *ex parte* for an interim cease and desist order or by a notice of hearing.

In the event that the application is granted *ex parte* the Board will at the same time set a date within ten days from the date of the order for a full hearing. The chairman or vice-chairman of the Board may sit alone on the *ex parte* application. The Board on the hearing would be empowered to assess penalties and costs against the party which looses the application. All penalties and costs would be at the discretion of the Board. It is suggested a penalty of up to $100 per day for each employee who participated in an illegal strike could be assessed against the union and a penalty of up to $100 per day for each employee who was illegally locked out could be assessed against the employer. In the event an *ex parte* order was obtained and it is not supported at the hearing a penalty of up to $100 per day for each employee who was prevented from striking could be assessed.

The Commission is of the opinion that it is the community that suffers in the event of an illegal strike or lock-out. Therefore the Commission recommends that any penalties assessed against a party be paid to a charity registered under the *Income Tax Act*. The money would be required to be used for objectives within the province. Once the penalties are assessed the aggrieved party would notify the Board of the charity to which the money is to be paid. Notwithstanding that the money is to be paid to a charity the province would be required to enforce the penalty in the same manner in which it would enforce the payment of any other money owing to the province.

One of the problems with illegal strikes is the fact that the employer is often reluctant to impose an effective sanction on its employees, such as suspension or discharge, because the employer requires its employees to perform their job functions. Often a substantial number of employees are involved in an illegal strike. The employer would be severely handicapped if it imposed a suspension on all of its employees or discharged them. Collective agreements often provide benefits based on an employees seniority. Yet unless the collective agreement provides for some specific discipline an employer may not be able to impose any discipline for breach of a collective agreement. It is generally accepted that an employer is not permitted to interfer with an employees seniority rights.[1]

It seems reasonable that if an employee violates a collective agreement by illegally striking that an employer should be able to impose some form of disciplinary sanction affecting a benefit covered by the collective agreement related to seniority.

In order to provide the employer with an effective remedy the Commission thinks that legislation should be enacted to expressly permit the employer to reduce an employee's seniority where the employee has participated in an illegal strike which has

---

[1] United Automobile Workers Local 127 v Hinde and Dauche Paper Ltd. 10 L.A.C. 70

not been authorized by the union. However, this sanction would only be available to the employer when the union has failed to authorize the strike. It is the Commission's opinion that when the union has authorized the strike an employee should not be expected to act contrary to a union position in order to avoid loosing his seniority. This would be an untenable position for the employee. If the strike has not been authorized by the union then the employee should know that it is illegal and that he should not participate in it. The Commission recommends that legislation be enacted which would allow an employer to deduct one months seniority for each day that an employee is on an illegal strike without union authorization.

PART 8 ARBITRATORS

I. AN EVALUATION

In order for the system of labour relations which we have in the province of New Brunswick to function effectively, the parties must have confidence not only in the system but also in those individuals on whom they call to resolve their disputes. The parties must believe that their disputes are being resolved fairly, competently, and expeditiously.

The parties expressed a number of concerns during the course of the public hearings which indicated that they did not have full confidence in arbitrators acting as third party neutrals. In some cases this was explained by the fact that arbitrators often begin their careers representing the interests of either the employer or the union. In addition, few arbitrators have any formal qualifications or training before they commence their careers. Another concern is the fact that some arbitrators are not familiar with the workplace and this contributes to the arbitrator's lack of understanding of the issues which he must resolve when a dispute is before him. Still other factors which have contributed to the parties' lack of confidence in arbitrators are the long delays which they must sometimes endure before obtaining awards and, in some cases, the high cost of the awards.

The Commission is of the opinion that the demand for third party neutrals will significantly increase in the future. The *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* case significantly broadened the role of arbitration in the labour relations system.[1] If the recommendations in this report are

---

[1] *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, 68 N.R. 112.

adopted, it is anticipated that in the future there will be an even wider variety of functions which third party neutrals will perform. For example, fact finders, commissioners, and public interest co-ordinators are all third party neutrals who are required to have expertise in various aspects of dispute resolution.

II. THE REGISTRATION OF ARBITRATORS

The Commission is of the opinion that one of the best ways to instill confidence in arbitrators is to provide a system for the registration of qualified arbitrators. This is presently being done in a number of jurisdictions throughout Canada.[1]

In the system envisaged by the Commission the Board would be responsible for determining the guidelines for the registration of arbitrators. The Commission believes that the Board should fulfill this function because it is composed of third party neutrals and representatives of the parties. The Board is in the best position to establish a system which will be responsive to the needs of the parties.

The Commission recommends that the Department of Labour be responsible for implementing programs to ensure that applicants for registration are properly qualified and trained. The Department of Labour should establish programs for training arbitrators in conjunction with the private sector. This could include the parties themselves or other organizations such as the Canadian Arbitrator's Institute, the Better Business Bureau, the New Brunswick Department of Advanced Education and Training, the Universities or the Law Society. Special effort should be made to attract women into the field of labour relations. At present they find it difficult to gain entry into the field.

The Commission is of the opinion that individuals who become registered as arbitrators under the guidelines should not be permitted to represent the parties or serve as

[1] For example, Ontario, Newfoundland and Manitoba have well organized systems for registering arbitrators.

nominees of the parties on arbitration boards. Anyone who did so would have his name struck from the list. This is essential to ensure confidence in registered arbitrators.

The Commission also recommends that applicants for registration who do not meet the guidelines complete courses or seminars which would provide them with the necessary qualifications. As well, the applicants for registration should be required to attend a specified number of arbitration hearings and write mock awards.

The result of implementing such a program would be to ensure that individuals could enter the field of arbitration without first acting as a representative or nominee of the parties. It would also ensure that arbitrators receive the proper training and experience before acting as arbitrators.

III. TIME CONTROLS

Arbitrators must render timely awards if confidence in the system is to be maintained. This has not always been the case. During the public hearings the parties brought to the attention of the Commission several cases in which arbitrators have failed to render timely awards. In some cases, the failure of the arbitrator to render a timely award was so serious that the integrity of the system was jeopardized. It is often said that justice delayed is justice denied. This is particularly true in the case of arbitration awards since many collective agreements have two year terms. In many cases an arbitration award will be of little use if the collective agreement has expired before the arbitrator renders his award. Although a dispute may still be resolved the arbitrator's award will not serve as a precedent to guide the parties in interpreting the collective agreement.

Section 75(1) of the *Industrial Relations Act* provides as follows:

> Where a difference has been submitted to arbitration under the provisions of section 55, the arbitrator or the arbitration board shall proceed with and complete the arbitration as expeditiously as possible, having regard to the interest of the parties, and shall make an award within three months after the date of the appointment of the arbitrator or the constitution of the arbitration

> board, or within three months after the date of an appointment or a reconstitution of a board on the filling of a vacancy, but the time for making an award may, from time to time, be extended by agreement of the parties, whether the time for making the award has expired or not, and a failure to make an award within the time expressed or as extended shall not invalidate the proceedings or terminate the authority of the arbitrator or the arbitration board, as the case may be.

Section 73(3.2) reads as follows:

> Where a difference has been submitted to arbitration under a collective agreement or under the provisions of section 55 and a party to the arbitration complains to the Minister that the arbitrator or the arbitration board, as the case may be, has failed to render a decision within a reasonable time, the Minister may, after consulting the parties and the arbitrator or the arbitration board, issue whatever order he considers necessary in the circumstances to ensure that a decision will be rendered in the matter without further undue delay.

While the statutory provisions provide some guidelines to arbitrators and the parties they should be strengthened and appropriate sanctions established.

The Commission recommends that legislation be adopted providing that where a party has failed to render an award within the time prescribed by section 75(1) of the Act or the collective agreement that either party be entitled to file a complaint with the Minister. The Minister upon receiving a complaint would not assign the arbitrator to any arbitrations until such time as his award is rendered. In addition, the Minister upon receiving a complaint would be required to notify the arbitrator of the complaint, without naming the complainant, and to bring to the arbitrator's attention another provision of the Act which the Commission is recommending which would entitle the Minister to terminate the arbitrator's authority upon receipt of a further complaint that the arbitrator has not rendered his award within a further period of three months. If the arbitrator fails to render his decision within six months from the date of his appointment and the Minister receives a further complaint the Minister may, after consultation with the parties, do the following:

(a) terminate the jurisdiction of the arbitrator,

(b) appoint a new arbitrator who shall hear the case *de novo*,

(c) order the arbitrator to return all documentation in his possession within ten days of receiving notification from the Minister and advise him that it is an offense under the Act not to do so,

(d) advise the arbitrator that he is not entitled to any fees or disbursements,

(e) advise the Board of the actions which he has taken whereupon the Board shall remove the arbitrator's name from the list of registered arbitrators and so advise the arbitrator.

By adopting these measures the Minister would have the authority and the flexibility to take appropriate action when an arbitrator delays in rendering his award. It is anticipated, however, that the Minister would only have to exercise his powers in those cases where there has been a clear abuse.

IV. COST CONTROLS

A. CONTROLS ON ARBITRATORS

Arbitration was designed to be an inexpensive method by which the parties could resolve their disputes. Unfortunately, the system has become very expensive and the parties have been quick to complain about arbitrator's accounts. In some cases the parties have complained that the hourly or daily rate charged by the arbitrator is too high. In other cases the parties have complained that the arbitrator's decision is unnecessarily long and complicated and that this has resulted in excessive fees. To resolve this problem the Commission recommends that every registered arbitrator be required to file a statement of the basis of his fees with the Board. This would give the parties a better idea as to how the arbitrator calculates his fees and enable them to gage the arbitrator's final account.

The Commission also recommends that the chairman or vice-chairman of the Board be empowered to review the accounts of registered arbitrators upon receipt of a complaint which is filed within a period of thirty days from the receipt of the arbitrator's account by a party. If the chairman or vice-chairman determined that the account was

excessive he could adjust it. There would be no appeal from the decision of the chairman or the vice-chairman.

B. CONTROLS ON THE PARTIES

One of the problems with arbitration is that it can be invoked by one of the parties to frustrate the other party. This takes its toll on the relationship between the parties. In addition, the party which is acting in an irresponsible manner may do so without suffering any immediate consequences other than a loss of respect by the other party.

The Commission is of the opinion that arbitrators should not normally impose costs against the unsuccessful party in an arbitration proceeding. Rather, the parties should continue to bear their own costs and to share on an equal basis the cost of an arbitrator. However, arbitrary and capricious conduct should not be disregarded.

Legislation should be introduced to ensure that those parties which engage in irresponsible conduct will at least face the possibility of sanctions being imposed on them. The Commission recommends that legislation be introduced which would give an arbitrator the power to make an award of costs against a party which has acted in an arbitrary or capricious manner. The sanctions could be applied against a party which forced the processing of a grievance to arbitration or a party which made the proceedings unduly difficult or time consuming. The decision to impose cost sanctions would be at the discretion of the arbitrator.

The Commission considered carefully the type of conduct which should attract a sanction and decided that it should be that conduct which is either arbitrary or capricious. The Commission considered whether sanctions should be imposed if a party failed to act in good faith in an arbitration proceeding but rejected that test as it was thought that it involved the arbitrator in making a determination about a party's subjective intentions which might make it difficult for an arbitrator to determine when sanctions

should be imposed. Therefore, the Commission determined that a more objective standard should be adopted.

SUMMMARY OF RECOMMENDATIONS

PART 1

1. Municipalities must have the authority to conduct effective labour relations.

2. Special legislation recognizing the distinction between labour relations in the municipal sector and that in the provincial public service and the private sector should be enacted.

PART 2

3. Either the *Industrial Relations Act* should be amended or a new statute entitled the "Municipal Services Employee Relations Act" enacted to provide special provisions governing municipal sector labour relations. Such legislation would include provisions for the creation of a municipal division of the Industrial Relations Board with employee and management representatives from the municipal sector or, in the alternative, provision for a Municipal Labour Relations Board under the new "Municipal Services Employee Relations Act".

PART 3

4. Legislation should be enacted to provide for the creation of supervisory bargaining units.

5. Legislation should be enacted to provide that the bargaining agent for a composite bargaining unit could make an application to the Board for the division of the unit into separate certifications for the occupational groups within the unit.

6. Legislation should be enacted to provide for a system of voluntary accreditation for municipalities based on either status or geographic location.

PART 4

7. Essential services in the municipal sector should be defined in the same manner in which they are defined in the *Public Service Labour Relations Act*, that is, those services which are required to ensure that the "health, safety or security of the public" is protected.

PART 5

8. Legislation should be enacted to provide a system of designation to ensure that essential services are delivered to the public in the event of a strike.

9. One year prior to the expiration of a collective agreement the employer will have the first opportunity to set out in a proposal the work required to be performed in order to deliver essential services to the public and the employees who are qualified to perform that work. The bargaining agent has the opportunity to accept or reject the employer's proposal and in the event of a dispute a public interest co-ordinator may be appointed by the Minister to assist the parties. In the event of an impasse the public interest co-ordinator

may make a recommendation to the Board. The Board may after receiving submissions from the parties or without a hearing approve a designation plan.

10. Designation plans will remain the same in subsequent rounds of negotiations unless there is a material change in circumstances which would require an amendment to the designation plan.

11. The Minister will be responsible for the overall administration of the system.

12. Bridging provisions will ensure that during the operation of a designation plan that those employees who are required to work will be covered by the terms and conditions of the just expired collective agreement.

13. The employer will continue to be responsible for the delivery of essential services to the public during a strike.

14. When a designation plan is in operation the employer shall not be entitled to use management personnel, other municipal employees, replacement personnel or outside contractors to perform the work of the bargaining unit.

15. During the operation of a designation plan the bargaining agent shall select the employees to perform the required work. The selection shall be made from the list of qualified employees set out in the designation plan.

16. When a designation plan is in effect the employer shall not be permitted to assign overtime to employees in the bargaining unit.

17. In the event of a perceived breach of the designation plan the aggrieved party may serve notice of the breach on the other party and the Board. The Board may assign an investigator, who shall have all the powers of a conciliation board, to resolve the dispute. In the event the investigator is unable to resolve the complaint, he shall make an order which may be appealed by either party to the Board within a further period of ten days.

18. In the event the employer uses non-designated personnel to perform bargaining unit work, while a designation plan is in effect, the employer should be required to pay an amount equal to that which was paid to the non-designated personnel to the bargaining agent. The bargaining agent would first have to establish that the work was done by the employer with the knowledge that it was bargaining unit work.

19. In the event the bargaining agent fails to provide employees to the employer to work, or fails to give the employer proper notice, the employer may make an application to the Board for an order permitting the employer to select the individuals to perform the designated work whereupon such individuals shall cease to strike.

20. In the event a designation plan is in operation the employer shall be required to pay into a special fund an amount equal to one-half the wages paid to employees who are performing the designated work during a strike. The fund shall be used to conduct labour relations seminars or training for the municipality and the bargaining unit. The fund shall be subject to their joint control.

21. Where the designation level exceeds twenty percent of the bargaining unit and the employer indicates in its notice to bargain that it intends to use designation, the bargaining agent shall have the unilateral right to select arbitration to resolve the dispute.

PART 6

22. Bargaining shall commence six months prior to the expiration of a collective agreement. If no collective agreement is in force then bargaining shall commence no less than two weeks after the designation process has been completed.

23. The notice to bargain shall set out:

    (a) the bargaining route selected by the party,

    (b) (i) if an employer, whether or not the employer intends to use designated employees if a designation plan is in place, or

        (ii) if a bargaining agent, whether the bargaining agent intends to use arbitration if the level of designation exceeds twenty percent of the bargaining unit and the employer intends to use designated employees to provide essential services during a strike, and

    (c) any changes to the existing collective agreement which the party intends to make to the collective agreement or any new proposals which the party would like to place on the bargaining table.

24. The parties shall file their notices to bargain with the Minister. After both parties have filed their notices the Minister shall exchange them.

25. The Minister in consultation with the parties shall establish the date, time and place of the first meeting. The first meeting shall take place within ten days of the date on which the proposals are exchanged.

26. Legislation should be enacted to provide five methods or routes for resolving bargaining impasses; two leading to economic sanctions, three leading to arbitration. The routes are as follows:

    (a) strike/lock-out routes:

        (i) public bargaining,

        (ii) fact finding;

    (b) arbitration routes:

        (i) conventional interest arbitration,

        (ii) mediation-arbitration,

        (iii) final offer arbitration.

27. In the public bargaining route:

(a) The parties will have ten days following the exchange of the notice to bargain to agree upon a bargaining route. In the event that they cannot agree they will be required to follow the public bargaining route. (In the event they select arbitration but do not agree on a route they will be required to follow the conventional arbitration route.)

(b) The negotiations between the parties shall be open to the public, unless a conciliation officer determines that it is in the best interest of the parties to close the conciliation meetings.

(c) A conciliator would have all the powers of a conciliation board.

(d) There shall be no provision for the appointment of a conciliation board or mediator.

(e) The conciliation officer may require the parties to set out their positions at the conclusion of negotiations.

(f) The report of the conciliation officer shall be released to the parties, by the Minister, ten days after he receives it. Within a further period of ten days the Minister may release it to the public if no agreement is reached.

(g) The conciliation officers would play a more active role in attempting to resolve disputes between the parties.

(h) The parties would not have the right to strike or lock-out until ten days after the release of the conciliator's report to the public.

28. In the fact finding route:

(a) In order to use the fact finding route the parties must jointly agree to use it.

(b) Negotiations between the parties are carried on in private and the parties are prohibited from releasing information to the public, until the fact finder's report is released.

(c) The fact finder has all the powers of a conciliation board.

(d) There is no provision for the appointment of a conciliator, a conciliation board or a mediator.

(e) Either party may apply for the appointment of a fact finder or the Minister may appoint the fact finder on his own initiative.

(f) The fact finder is required to convene a meeting with the parties within ten days of the date of his appointment and file his report with the Minister within thirty days of the date of his appointment. The fact finders report is submitted to the parties within ten days of its receipt by the Minister. If the parties fail to come to an agreement the Minister shall release the report to the public within a further period of ten days.

(g) The parties would not be entitled to proceed to a strike or a lock-out until ten days after the fact finder's report is released to the public.

(h) In making his report, the fact finder shall utilize the same guidelines which apply to interest arbitrators.

(i) The parties are not prohibited from releasing information to the public after the release of the fact finder's report to the public.

(j) The parties would not have the right to strike or lock-out until ten days after the release of the fact finder's report to the public

29. In the event the parties decide to use a three-member arbitration board to resolve a bargaining impasse, and the nominees of the parties are unable to agree on a chairman, the Minister shall dismiss the nominees and appoint the chairman.

30. If the parties agree to use arbitration to resolve a bargaining impasse but cannot decide whether to use a three-member board or a single arbitrator the Minister shall appoint a single arbitrator to resolve their dispute.

31. Provision should be made for the registration of arbitrators.

32. The Board should establish guidelines for the registration of qualified arbitrators.

33. The Minister of Labour should ensure a program is available for providing training for arbitrators.

34. Legislation should be enacted to set out the following guidelines for interest arbitrators. Arbitrators shall consider:

(a) the public interest, including the economic and social results of the settlement;

(b) the terms and conditions of employment and similar occupations outside the employer's employment;

(c) the need to maintain appropriate relationships in the terms and conditions of employment between different classifications;

(d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, work performed, responsibility assumed and nature of the services rendered;

(e) local economic conditions and, in particular, labour market conditions;

(f) the financial status of the municipality;

(g) those terms and conditions of employment which have already been agreed upon by the parties.

35. The parties should endeavour to restrain themselves in challenging interest arbitration awards.

36. In the conventional arbitration route:

    (a) The parties may agree to follow the conventional arbitration route or in the event they choose arbitration but are unable to decide on which route to follow they shall be deemed to follow the conventional arbitration route.

    (b) There will be no provisions for the appointment of a conciliation board or a mediator.

    (c) A conciliator shall have all the powers of a conciliation board under the Act.

    (d) The conciliator would be expected to function in the same manner as a conciliator in the public bargaining route except that the report would not be released to the public.

    (e) In the event of an impasse either party to the dispute may make an application for the appointment of an arbitrator.

    (f) The arbitrator shall have all the powers of an arbitrator under section 76 of the *Industrial Relations Act*.

    (g) The arbitrator may choose from the submissions of the parties or he may fashion his own award.

37. In the mediation-arbitration route:

    (a) The parties must agree to follow that route.

    (b) A conciliation officer, conciliation board, mediator or fact finder will not be available to the parties.

    (c) The parties will be required to use a single mediator-arbitrator.

    (d) The Minister may appoint the mediator-arbitrator on the request of either party or on his own initiative.

    (e) The arbitrator will be required to mediate the dispute; however, if he is unable to mediate it he will decide it by arbitration.

    (f) The arbitrator will have all the powers of an arbitrator under section 76 of the *Industrial Relations Act*.

38. In the final offer arbitration route:

    (a) The parties can use final offer arbitration to resolve their differences providing they jointly agree to use it.

    (b) There is no provision for the appointment of a conciliation board, a mediator or a fact finder.

(c) The conciliation officer would have all the powers of a conciliation board under the Act.

(d) Either or both of the parties could make an application to the Minister for the appointment of a conciliation officer or the Minister could appoint the conciliation officer on his own initiative.

(e) The conciliatior has the power to require the parties to submit their final positions to him for the purpose of filing his report with the Minister.

(f) The conciliation officer will function in the same manner as a conciliation officer in the public bargaining route, however, his report shall not be released to the public.

(g) Either or both parties may make an application to the Minister for the appointment of an arbitrator. The Minister may also appoint the arbitrator on his own initiative.

(h) Neither party may make an offer at arbitration which they did not make during conciliation.

(i) The proposals of the parties shall be divided into monetary and non-monetary items. In the event of a dispute as to what constitutes a monetary or non-monetary item the arbitrator shall make a ruling.

(j) The arbitrator will select one of the monetary packages that has been submitted to him by the parties. The arbitrator may determine the non-monetary items on an item-by-item basis. The arbitrator, in respect of the non-monetary items, may not fashion his own award, however, he may bridge the provisions in the event there is any inconsistency or ambiguity.

39. A system of last offer votes should be enacted. Each party could request that a last offer vote be taken only once. The request is made to the Minister who shall be responsible for supervising the vote.

40. Where a party requests the last offer vote it must ensure that sufficient copies are provided to the other party so that it can distribute a copy to each member of the unit or municipal council. The party required to take a vote must take reasonable steps to ensure that those entitled to vote have a copy of the proposal. A last offer vote is to be conducted by secret ballot, notwithstanding, any provisions in the *Municipalities Act* to the contrary.

41. The party required to take the vote would have the option of accepting the proposal or any alternative proposal which was subsequently placed on the table for a two month period from the date of the last offer vote.

42. In the event the employer uses designated employees to perform essential services, the striking employees should be prohibited from picketing. However, in the event the employer uses other municipal workers, replacement personnel or outside contractors to deliver municipal services to the public, the union should be permitted to engage in picketing.

43. In the event designated personnel are used to provide essential services to the public during a strike, the provisions of the collective agreement should remain operative with respect to the employees who work until a new collective agreement is negotiated or the parties terminate their bargaining relationship.

44. In the event of a strike or a lock-out when no designation plan is in operation, it is recommended that those provisions of the collective agreement relating to discharge, discipline, grievance procedures and arbitration should continue to apply.

45. The *Emergency Measures Act* should be amended in order to ensure that civic officials cannot use the provisions of the Act to terminate an otherwise lawful strike. In the event an emergency arises during a lawful strike or lockout that affects employees who are striking or locked out, the power to invoke a "state of local emergency" should be vested in provincial authorities.

46. Legislation should be enacted which would require the appropriate authorities to declare when a state of emergency has ended, so that a strike or lock-out may be resumed in an orderly fashion.

PART 7

47. The parties should include in their collective agreement provision for labour management committees.

48. Each party should appoint senior personnel to their labour management committee, labour management committees should meet on a regular basis, and the chairman's position should be alternated between the parties.

49. Those parties requiring assistance in setting up a labour management committee should contact the Industrial Relations Branch of the Department of Labour.

50. The parties should make greater use of the grievance mediation services provided by the Industrial Relations Branch of the Department of Labour.

51. The Department of Labour should take further steps to ensure that the parties are aware of the Department's grievance mediation program.

52. Labour and management should endeavour to work together to develop their own grievance mediation programs.

53. The parties should adopt the practice of using single arbitrators to resolve their rights disputes.

54. The statutory arbitration provision should be amended to provide for arbitration of rights disputes by a single arbitrator.

55. In the event a collective agreement between the parties specifies that a three-member arbitration board be used to resolve their rights disputes and the nominees of the parties cannot agree on a chairman and the Minister is required to appoint the chairman, the nominees of the parties shall be dismissed and a single arbitrator appointed by the Minister shall determine the matter.

56. The legislation should be amended to provide for pre-hearing disclosure in the case of suspension and discharge cases.

57. A system of commissioner arbitration should be established in the legislation providing the parties with another vehicle to resolve rights disputes.

58. The awards of commissioner arbitrators should not be used as precedents for the parties.

59. A system of expedited arbitration should be enacted in the legislation.

60. Expedited arbitration would be available to the parties upon joint application to the Minister by the parties, or by either party in a suspension or discharge case.

61. In expedited arbitration, the Minister would be responsible for appointing an arbitrator from the list of registered arbitrators and shall set the date and time of the arbitration in consultation with the parties, without informing them as to the name of the arbitrator. The arbitrator would be required to meet with the parties within thirty days of the date on which the Minister receives the application for his appointment.

62. Under the expedited arbitration system, the Minister upon receiving an application for the appointment of an arbitrator, would immediately appoint a grievance mediation officer from the staff of the Industrial Relations Branch of the Department of Labour to contact the parties in an effort to mediate the dispute. In the event mediation fails, the parties shall continue to arbitration.

63. An arbitrator appointed under the expedited arbitration provisions will render his award within a period of ten days from the conclusion of the arbitration hearing.

64. The parties should be required to file with the Board a certificate of authorization before proceeding with a strike or lock-out. In any case in which a certificate of authorization is not filed the strike or lock-out would automatically be deemed to be illegal.

65. The Board should be given the power to issue cease and desist orders and the power of the courts to issue injunctions where the board can issue a cease and desist order should be terminated.

66. The Attorney General should be given the responsibility for enforcing cease and desist orders.

67. In the event of an unauthorized strike or lock-out

    (a) A party may make an application to the Board for a cease and desist order without notice to the other parties.

    (b) As an alternative, the party may give 24 hours notice to the other party to terminate the strike or lock-out. If the party fails to terminate the strike or lock-out for all subsequent proceedings the strike or lock-out will be deemed to be authorized unless the party establishes that it has used every reasonable effort to terminate the strike or lock-out.

68. In the event of an authorized strike or lock-out which a party claims to be illegal:

    (a) The party may apply for an interim cease and desist order pending a hearing. When an interim order is obtained, a subsequent hearing must be held.

    (b) In lieu of an application for an interim order, the party may request a hearing on notice before the Board.

    At such hearing, if the party does not establish that the strike or lock-out is illegal, the party shall be subject to a monetary penalty and the finding is binding for grievance procedings. If the party establishes at the hearing, that the strike is illegal, the party shall be subject to a monetary penalty and the finding is binding for grievance proceedings.

69. Applications to the Board shall not preclude the parties using the grievance procedure.

70. When employees participate in an unauthorized strike the employer should be empowered to impose as a disciplinary sanction for breach of the provisions of the collective agreement, loss of seniority.

PART 8

71. Registered arbitrators should be prohibited from representing the parties or serving as the nominees of the parties on arbitration boards.

72. In the event an arbitrator fails to file his award within three months from the date of the hearing, on receipt of a complaint, the Minister should be empowered not to assign the arbitrator to any more arbitrations.

73. In the event an arbitrator fails to file his award within a further period of three months, the Minister should be empowered to remove the arbitrator from office and appoint a new arbitrator who shall hear the case *de novo*.

74. When an arbitrator is removed from office:

    (a) he shall return all documents related to the arbitration hearing,

    (b) he shall not be entitled to any fees or disbursements, and

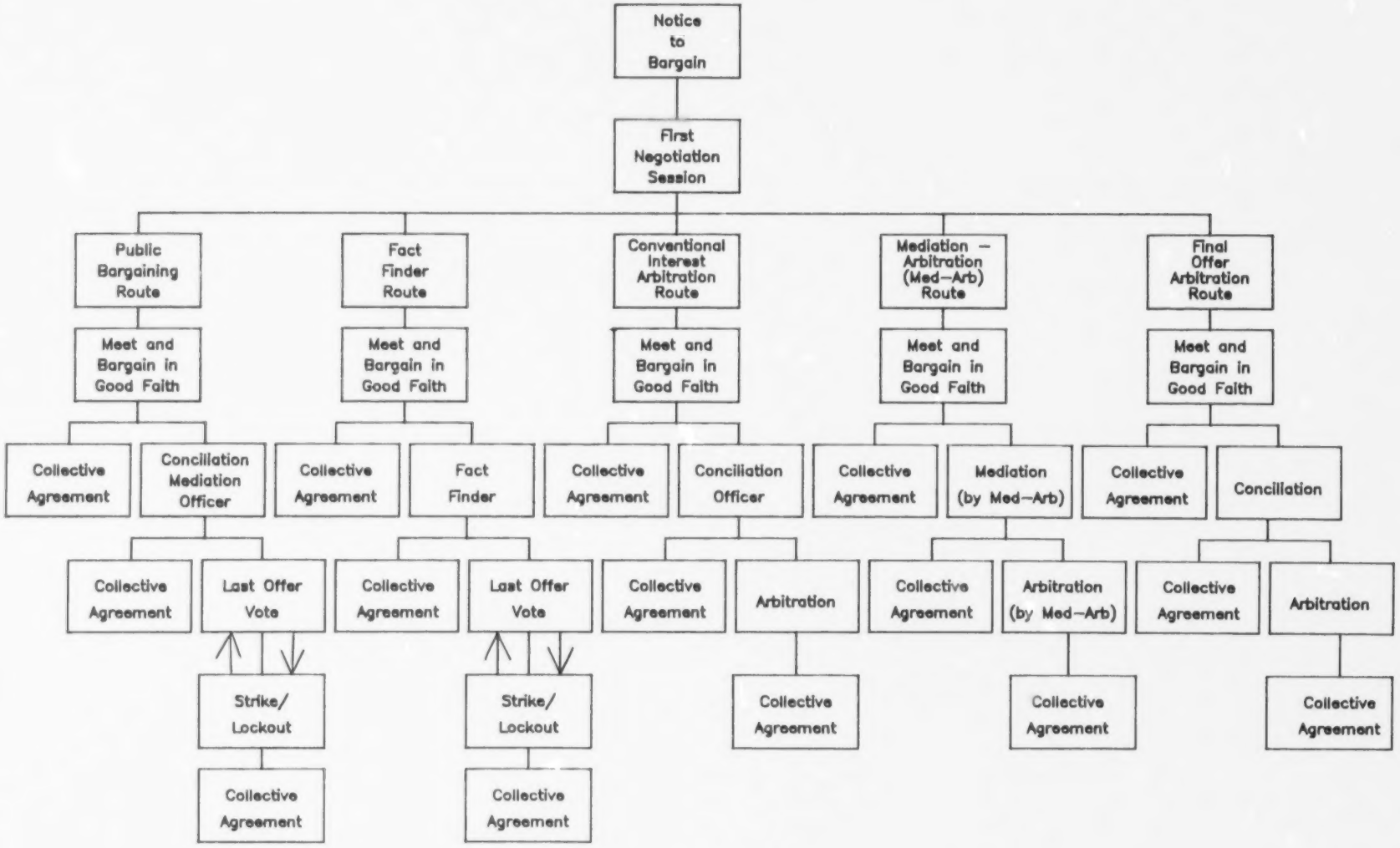
    (c) he shall have his name removed from the list of registered arbitrators.

75. Registered arbitrators should be required to file the basis of their fees and charges with the Board.

76. The chairman or vice-chairman of the Board should be given the power to review the accounts of arbitrators.

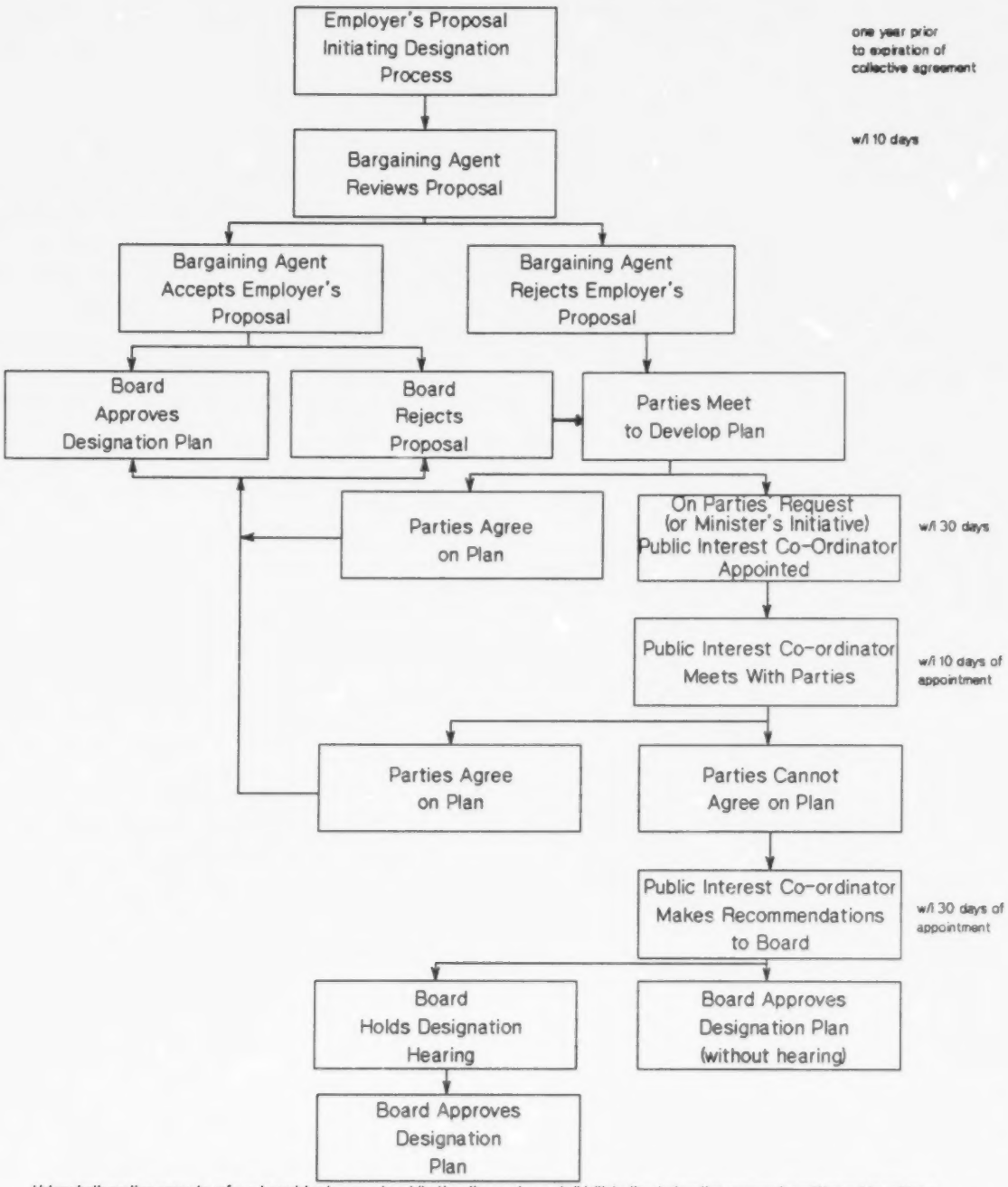
77. An arbitrator should be given the power to assess costs against a party in the event the party has engaged in arbitrary or capricious conduct.

Bargaining Procedure



APPENDIX B

Implementation of Designation
Initial Designation


Employer's Proposal Initiating Designation Process
one year prior to expiration of collective agreement
Bargaining Agent Reviews Proposal
w/i 10 days
Bargaining Agent Accepts Employer's Proposal
Bargaining Agent Rejects Employer's Proposal
Board Approves Designation Plan
Board Rejects Proposal
Parties Meet to Develop Plan
Parties Agree on Plan
On Parties' Request (or Minister's Initiative) Public Interest Co-Ordinator Appointed
w/i 30 days
Public Interest Co-ordinator Meets With Parties
w/i 10 days of appointment
Parties Agree on Plan
Parties Cannot Agree on Plan
Public Interest Co-ordinator Makes Recommendations to Board
w/i 30 days of appointment
Board Holds Designation Hearing
Board Approves Designation Plan (without hearing)
Board Approves Designation Plan

Unless both parties agree to refer a bargaining impasse to arbitration, the employer shall initiate the designation process by setting out in writing a proposal as to the manner by which essential services might be provided to the public in the event of a strike. The employer shall set out in his proposal the positions in the bargaining unit which would be required to deliver those services and shall service a copy of the notice on the bargaining agent, the Minister and the Board, one year prior to the expiration of the collective agreement.

APPENDIX D

COMMISSION OF INQUIRY
INTO
MUNICIPAL LABOUR RELATIONS

LIST OF SUBMISSIONS PRESENTED AT HEARINGS

Fredericton, New Brunswick

Wednesday, October 8, 1986

#1.	Provincial Municipal Council
#2.	New Brunswick Police Association
#3.	Department of Municipal Affairs and Environment

Thursday, October 9, 1986

#4.	New Brunswick Division of CUPE
#5.	City of Fredericton

Dalhousie, New Brunswick

Tuesday, October 14, 1986

#6.	Town of Dalhousie
#7.	CUPE Municipal Employees Briefs From .Local 76 - Campbellton Civic Workers .Local 188 - Town of Dalhousie (Civic & Police)
#8.	Campbellton-Dalhousie District Labour Council

APPENDIX D

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Edmundston, New Brunswick

Wednesday, October 15, 1986

#9.	**CUPE Municipal Employees Brief From** .Local 60 - Edmundston Civic Employees .Local 2382 - St. Leonard Civic Workers .Local 886 - Town of Grand Falls Employees **and Edmundston & District Labour Council Brief**
#10.	**City of Edmundston**
#11.	**CUPE Municipal Police Brief From** .Local 558 - Edmundston Police .Local 1847 - Town of Grand Falls Police
#12.	**Village of Saint Basile**

St. Stephen, New Brunswick

Wednesday, October 22, 1986

#13.	**Town of St. Stephen**
#14.	**CUPE Municipal Employees Brief From** .Local 770 - St. Stephen Civic Employees .Local 1863 - St. Stephen Police

APPENDIX D

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Woodstock, New Brunswick

Thursday, October 23, 1986

#15. **CUPE Municipal Employees Brief From**
.Local 719 - Woodstock Employees
.Local 2029 - Woodstock Police
.Local 2029 - Nackawic Police

#16. **Town of Woodstock**

#17. **CUPE Municipal Employees Brief From**
.Local 508 - Fredericton Civic Workers
.Local 1709 - Fredericton Inside Workers
.Local 1783 - Fredericton Transit Workers
.Local 502 - Fredericton Police
.Local 996 - Oromocto Civic Workers

Bathurst, New Brunswick

Wednesday, October 29, 1986

#18. **City of Bathurst**

#19. **CUPE Municipal Employees Brief From**
.Local 550 - Bathurst Outside Workers
.Local 1282 - Bathurst Inside Workers

#20. **CUPE Municipal Police Brief From**
.Local 1497 - Bathurst Police

#21. **Bathurst & District Labour Council**

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Shippagan, New Brunswick

Thursday, October 30, 1986

#22.	Town of Shippagan
#23.	Town of Tracadie
#24.	Acadian Peninsula Labour Council

Moncton, New Brunswick

Wednesday, November 5, 1986

#25.	City of Moncton
#26.	CUPE Municipal Employees Brief From .Local 51 - Moncton Civic Workers .Local 2162 - Riverview Civic Workers .Local 1188 - Sackville Police & Civic Workers .Local 2754 - Dieppe Police .Local 490 - Moncton City Police
#27.	Town of Shediac
#28.	Moncton & District Labour Council
#29.	Town of Riverview
#30.	Robert L. Rideout
#31.	Town of Dieppe

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Newcastle, New Brunswick

Thursday, November 6, 1986

#32.	**CUPE Municipal Employees Brief From** . Local 1387 - Newcastle Civic Workers . Local 1235 - Chatham Civic Workers . Local 1275 - Newcastle Police . Local 2004 - Chatham Police
#33.	**Town of Chatham**
#34.	**Newcastle-Chatham District Labour Council**

Sussex, New Brunswick

Wednesday, November 12, 1986

#35.	**Town of Sussex**
#36.	**CUPE Municipal Employees Brief From** .Local 2163 - Sussex Civic Workers .Local 2806 - Sussex Police
#37.	**Richard Bell**

APPENDIX D

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Saint John, New Brunswick

Thursday, November 13, 1986

#38.	**CUPE Municipal Employees Brief From** .Local 18 - Saint John Civic Workers .Local 2389 - Town of Rothesay Civic Workers .Local 2404 - Grand Bay Civic Workers
#39.	**CUPE Municipal Employees Brief** .Local 486 - Saint John Inside Workers
#40.	**Saint John Board of Trade**
#41.	**Saint John & District Labour Council**
#42.	**Village of Grand Bay**
#43.	**Roger G. Steed**
#44.	**Saint John Women for Action**

APPENDIX D

LIST OF SUBMISSIONS PRESENTED AT HEARINGS (CONT'D)

Saint John, New Brunswick

Friday, November 14, 1986

#45.	Department of Justice
#46.	New Brunswick Federation of Labour
#47.	CUPE Municipal Police Brief From .Local 61 - Saint John Police Association .Local 1905 - Town of Rothesay Police
#48.	Deborah Armstrong and Beth Gilbert (U.N.B. Saint John)
#49.	City of Saint John

APPENDIX D

LIST OF SUBMISSIONS WHICH WERE NOT PRESENTED AT HEARINGS

#50.	City of Campbellton
#51.	Perth-Andover
#52.	Association of University of New Brunswick Teachers
#53.	Board of School Trustees, School District Number 20
#54.	Saint John Board of Police Commissioners

LIST OF REPLIES WHICH WERE RECEIVED IN RESPONSE TO SUBMISSIONS

#55.	Canadian Union of Public Employees Local 61
#56.	International Association of Firefighters
#57.	Haydn Mason
#58.	New Brunswick Division Canadian Union of Public Employees
#59.	City of Saint John
#60.	Town of Woodstock
#61	Town of St. Stephen
#62	M. J. McPherson Consulting

BIBLIOGRAPHY

Adams, George W. "The Ontario Experience with Interest Arbitration: Problems in Detecting Policy," Relations Industrielles Industrial Relations Vol. 36, No. 1, 1981. 226-250.

Adams, George W. Canadian Labour Law. Ontario: Canada Law Book Inc., 1985.

ALRA Editorial Committee. Selected Proceedings of the 31st Annual Conference of the Association of Labor Relations Agencies (July 25-30). California: (ALRA), 1982.

Anderson, John and Gunderson, Morley. Union-Management Relations In Canada. Don Mills, Ontario: Addison-Wesley Publishers, 1982.

Andiappan, P., Cattaneo, R. Julian and Murphy, John. "Attitudes of Union and Management Officials Toward Interest Arbitration in Ontario Hospitals, Working Paper No. 84-005." Windsor: University of Windsor Faculty of Business Administration, 1984.

Arthurs, H.W. Labour Disputes in Essential Industries. Ottawa: Task Force on Labour Relations (under the Privy Council Office), 1968.

Arthurs, H.W. Collective Bargaining by Public Employees in Canada: Five Models. Ann Arbor: Institute of Labor and Industrial Relations, 1971.

Arthurs, H.W., Carter, D.D. and Glasbeek, H.J. Labour Law and Industrial Relations in Canada. Ontario: Butterworths and Co. Ltd., 1981.

Baderschneider, Jean. "The Impact of Collective Bargaining Laws Covering Police and Firefighters on Municipal Expenditures and Fiscal Strain." Industrial Relations Research Association Series, Proceedings of the Thirty-First Annual Meeting, August 29-31, Chicago: I.R.R.A. 1978, 162 - 164.

Bornstein, Tim. "Legacies of Local Government Collective Bargaining in the 1970's." Labour Law Journal, Vol. 31, No. 3 (1980), 165-173.

Brown, Donald J.M. and Beatty, David M. Canadian Labour Arbitration. Ontario: Canada Law Book Limited, 1984.

Bussey, Ellen M. "Labour Relations in the Public Sector." Industrial Relations Research Association Series Industrial Relations - Comparative International Industrial Relations - Proceedings of the Spring Meeting Jamaica - May 3-6, (1973), 512-516

Burger, Warren E. "Isn't There A Better Way?" Washington, D.C.: Society of Professionals in Dispute Resolution (SPIDR), 1982.

Canada's First City Saint John. Saint John, N.B.: Lingley Printing Co. Ltd., 1962.

Carrothers, A.W.R., Palmer, E.E. and Rayner, W.B. Collective Bargaining Law In Canada 2nd ed. Toronto: Butterworths, 1986.

Chase, Stephen A. "Binding and Final Offer Arbitration: Alternatives For The Strike in the New Brunswick Public Sector". (Unpublished Paper), 1976.

Chvala, Charles J. and Fox, Michael. "Final Offer Mediation-Arbitration and The Limited Right to Strike: Wisconsin's New Municipal Employment Bargaining Law." Wisconsin Law Review (1979), 167-189

Chermesh, Ran. "Strikes as Safety-Valve Institutions." Relations Industrielles Industrial Relations, v. 32 (1977), 586 - 601.

Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia. "Making Bargaining Work In British Columbia's Public Service." Victoria: Province of British Columbia, 1972.

Commission to Review the Collective Negotiation Process Between Teachers and School Boards (Report of) Toronto: Province of Ontario, 1980.

Commission of the European Communities. "The Prevention and Settlement of Industrial Conflict in the Community Member States" 136-143.

Commission of the European Communities. "Problems and Prospects of Collective Bargaining in the EEC Member States" 119-121.

Conflict and Cooperation in Police Labour Relations. Ed. Bryan M. Downie and Richard Jackson, Hull, Quebec: Supply and Services Canada, 1980.

Corsano, Gary J. "Public Sector Labour Relations In The Province of Nova Scotia". (Unpublished paper), 1985.

Craig, Alton W.J. The System of Industrial Relations in Canada. Scarborough: Prentice-Hall Canada Inc., 1983.

Crawford, James F. "Public Sector Bargaining in Six Southeastern States: Recent Experience." Industrial Relations Research Association - Proceedings of the 1981 Spring Meeting April 29 - May 1, 1981 Huntington, West Virginia. Georgia State University: 1981.

Crispo, John. "Collective Bargaining In The Public Service: Seminar Report." Institute of Public Administration of Canada

Daniel, Mark J. and Robinson, William E.A. Employment Growth in the Public Sector: 1960-1979. Ontario: The Conference Board in Canada, 1980.

Dworkin, James B. "Final Position Arbitration and Intertemporal Compromise." Relations Industrielles Industrial Relations v. 32 (1977), 250-261.

Edwards, Harry T. "Advantages of Arbitration Over Litigation: Reflections of a Judge." Washington, D.C.: Harry T. Edwards, 1982.

Feigenbaum, Charles. "Final Offer Arbitration: Better Theory Than Practice." Relations Industrielles Industrial Relations, Vol. 14, No. 3, 1975.

Feldman, Lionel D. and Graham, Katherine A. Bargaining For Cities, Municipalities and Intergovernmental Relations An Assessment. Toronto: Institute for Research on Public Policy, 1979.

Feuille, Peter and Dworkin James B. "Final-Offer Arbitration and Intertemporal Compromise or It's My Turn to Win." Industrial Relations Research Association

Series - Proceedings of the Thirty-First Annual Meeting, August 29-31, 1978 Chicago. (1978), 87-95.

Feuille, Peter and Delaney, John Thomas. "Collective Bargaining, Interest Arbitration, and Police Salaries." Industrial and Labor Relations Review, Vol. 39, No. 2, (1986), Cornell University, 228-240.

Finkelman, J. Employer-Employee Relations In The Public Service of Canada Parts I, II and III. Ottawa: Information Canada, 1974.

Finkelman, J. "Municipal Collective Bargaining in Canada" (Address presented at Annual Meeting of the Canadian Bar Association). Ottawa: 1977.

Finkelman, Jacob and Goldenberg, Shirley B. Collective Bargaining in the Public Service Vol. 1 and 2. Quebec: The Institute for Research on Public Policy, 1983.

Finn, Ed. The Right to Strike - Questions and Answers. Ottawa: Canadian Centre for Policy Alternatives, 1982.

Fleming, R.W. "Public-Employee Bargaining: Problems and Prospects." Industrial Relations Research Association Series Proceedings of the Thirty-First Annual Meeting, August 29-31, 1978. Chicago: University of Michigan: 1978.

Forsey, Eugene A., Richardson, J. Albert and Kealey, Gregory S. Perspectives on the Atlantic Canadian Labour Movement and the Working-Class Experience. Sackville, New Brunswick: Centre for Canadian Studies, Mount Allison University, 1985.

Frank, James G. Compensation and Industrial Relations - Into the 1980s. Ottawa: The Conference Board in Canada, 1979.

Frankel, Saul. Royal Commission on Employer Employee Relations in the Public Service of New Brunswick Report. Fredericton: Province of New Brunswick, 1967.

Gentel, William D. and Handman, Martha L. Police Strikes: Causes and Prevention. United States of America: International Association of Chiefs of Police, Inc., 1979.

Goldenberg, Shirley B. "Public Service Bargaining Implications for White-Collar Unionism." Kingston, Ontario: Industrial Relations Centre Queen's University, (1973).

Gunderson, Morley. Collective Bargaining in the Essential and Public Service Sectors. Toronto: University of Toronto Press, 1975.

Gunderson, Morley. Economic Aspects of Interest Arbitration. Toronto: Ontario Economic Council.

Gunderson, Morley and Kervin, John and Reid, Frank. Strikes In Canada Phase I on Theories of Strike Determination and Strike Consequences. Ontario: Centre For Industrial Relations, University of Toronto, 1983.

Gunderson, Morley and Kervin, John and Reid, Frank. A Micro Model of Strike Incidence and Duration. Ontario: Centre For Industrial Relations, University of Toronto, 1984

Hardy, Fred J. and Ponak, Allen. "Staff Relations In The Royal Canadian Mounted Police." Collective Negotiations, Vol. 12(2), Baywood Publishing Co., Inc., 1983.

Hawkins, Deanna F. "Interest Arbitration A Comparison of Public Sector Legislation in New Brunswick and Nova Scotia". (Unpublished paper), 1985.

Helburn, I.B. and Matthews, J.L. "The Referendum As An Alternative To Bargaining." Journal of Collective Negotiations in the Public Sector, Vol. 9(2) (1980), 93-105.

Herman, Edward E. and Kuhn, Alfred. Collective Bargaining and Labor Relations. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1981.

Hum, Stanley T. "Freedom of Contract in the Public Sector". (Unpublished paper), 1985.

Industrial Inquiry Commission. Report in the Matter of the Dispute Between City of Bathurst and Bathurst Civic Employees, Local 550 Canadian Union of Public Employees. Fredericton: Province of New Brunswick, 1969.

International Labour Congress. "Convention No. 1 Limiting the Hours of Work in Industrial Undertakings to Eight Hours in the Day and Forty-eight in the Week", Geneva: International Labour Congress, 1919.

International Labour Congress. "Convention No. 14 Concerning the Application of the Weekly Rest in Industrial Undertakings", Geneva: International Labour Congress, 1921.

International Labour Congress. "Convention No. 26 Concerning the Creation of Minimum Wage-Fixing Machinery", Geneva: International Labour Congress, 1928.

International Labour Congress. "Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize", Geneva: International Labour Congress, 1948.

Jackson, R. L. "Canadian Police Labour Relations in the '80s: New Concerns" Canadian Police College Journal No. 2, 1986.

Jackson, R.L. In the Matter of a Fact Finding between The Metropolitan Separate School Board and The Branch Affiliates of L'Association des Enseignants Franco-Ontariens and The Ontario English Catholic Teachers' Association. Toronto: 1986.

Jamieson, S.M. Industrial Conflict in Canada 1966-75 "Discussion Paper No. 142". Ottawa: Economic Council of Canada, 1979.

Johnson, John H Jr. "Critical Issues and Problems in Collective Bargaining. A Management Perspective". Industrial Relations Research Association, Proceedings of the 1977 Annual Spring Meeting, March 17-19, 1977 Tucson, Arizona. Labor Law Journal, (1977), 545-549.

Journal of Collective Negotiations in the Public Sector Ed. Kershen, Harry. Vol. 5 (1976), No. 1 & 4; Vol. 6 (1977), No. 1, 2 & 6; Vol. 7 (1978), No. 1, 2, 3 & 4; Vol 12 (1983), No. 4. United States of America: Baywood Publishing Company, Inc..

Katz, William D. "Public Referendums and Public Employee Collective Bargaining: Are They Compatible?" Journal of Collective Negotiations in the Public Sector Vol. 8, No.2 (1979), 183-194.

Kerur, Sharad. Factfinding: A Dispute Resolution Procedure for Collective Bargaining. Kingston: Industrial Relations Centre Queen's University, 1986.

Kervin, John; Gunderson, Morley and Reid, Frank. Two Case Studies of Strikes: Final Report. Ontario: Centre For Industrial Relations, University of Toronto, 1984.

Killingsworth, Charles C. "The Role of Public Service Employment" - Industrial Relations Research Association. Proceedings of the 1977 Annual Spring Meeting March 17-19. Tucson, Arizona. Madison, Wisconsin: Industrial Relations Research Association, 1977, 489 - 495.

Kinsella, Noel A. Digest of Labour Legislation In The United States And Canada For The Firefighters and Police,Vol. One, Two, Three and Four. (Unpublished), 1977.

Kovach, Kenneth A. "State and Local Public Employee Labour Relations - Where are They Headed?" Journal of Collective Negotiations in the Public Sector. Baywood Publishing Co. Ltd., 1979, 19 - 29.

Labour Canada. Major Wage Settlements. Ottawa: Labour Canada, 1986.

Labour (Department of). "Discussion Paper on Guidelines for Arbitrators in the Prince Edward Island Public Sector", Charlottetown: Province of Prince Edward Island, 1985.

Labour (Department of). Alberta Labour Legislation Review Committee Final Report. Edmonton: Province of Alberta, 1987.

Labour and Human Resources (Department of). "Negotiation Impasse Alternatives: Strike/Lockout or Final Position Bargaining Option," Fredericton: Province of New Brunswick, 1984.

Labour (Ontario Ministry of). Annual Report. Toronto: Province of Ontario, 1981 - 1985.

Labour Relations Board of British Columbia. Annual Report. Victoria: Province of British Columbia, 1983 - 1985.

Larson, Peter E. and DuBroy, Robert. Compensation in the Public and Private Sectors Report 13-86. Ottawa: The Conference Board of Canada, 1986.

Lewin, David and McCormick, Mary. "Coalition Bargaining in Municipal Government: The New York City Experience." Industrial and Labour Relations Review, Vol. 34, No. 2 (1981), 175-190.

Loihl, John R. "Final Offer Plus: Interest Arbitration in Iowa"

Logan, H. A. Trade Unions in Canada. Toronto: The MacMillan Company of Canada Limited, 1948.

MacDonald, Donald S., Chairman. Royal Commission on the Economic Union and Develop ment Prospects for Canada Vol. One, Two and Three. Ottawa: Minister of Supply and Services, 1985.

MacGillivray, James. " Final Offer Selection". (Unpublished paper), 1985.

Marsters, Irv. "Increased Maturity and Sophistication Mark Labor Relations Today." Public Management, Vol. 62, No. 2, 2-16.

McGill University 27th Annual Conference, The Problem of "Essential Services": Inconvenience, Importance Or Emergency. Ed. Pathy, Alexander C. and Loerick, Glenna. Montreal: McGill University, 1979.

McNulty, Sean E. "The Right of Public Service Employees To Strike". (Unpublished paper), 1985.

Mombourquette, David A. "Bargaining Disputes In The Public Sector Developing A Strike Alternative". (Unpublished paper), 1986.

Morrow, W.G.J. "Police Bargaining In New Brunswick and Whether Municipal Police Officers Should Have The Right To Strike". (Unpublished paper).

Mulcahy, Charles and Ruesch, Gary M. "Wisconsin's Municipal Labour Law: A Need for Change." Marguette Law Review, Vol. 64, No. 1 (1980), 103-132.

Municipal Affairs and Environment (Department of). Annual Report of Municipal Statistics, Vol. 2. Fredericton: Province of New Brunswick, 1983.

Municipal Affairs and Environment (Department of). Annual Report of Municipal Statistics, Vol. 1. Fredericton: Province of New Brunswick, 1986.

Municipal Affairs and Environment (Department of). Review of New Brunswick's Unconditional Grant to Municipalities. Fredericton: Province of New Brunswick, 1986.

New Brunswick Occupational Health and Safety Commission. Proposed Occupational Health and Safety Regulations. Fredericton: Province of New Brunswick, 1986.

New Brunswick Police Commission. "Managerial Review Saint John Police Department" 1986.

New Brunswick Police Commission. Annual Report 1985-1986. Fredericton: Province of New Brunswick, 1986.

New Techniques in Labor Dispute Resolution - A Report of the 23rd Conference of the Association of Labor Mediation Agencies (July 28 - August 2, 1974) and the 2nd Conference of the Society of Professionals in Dispute Resolution (November 11 - 13, 1974). Ed. Anderson, Howard J., Washington, D.C.: The Bureau of National Affairs, Inc., 1974.

New York State School of Industrial and Labor Relations. Industrial & Labor Relations Review Vol. 34, Number 2. New York: Cornell University, 1981.

Nova Scotia Department of Labour. "Essential Service Dispute Legislation In Canada". Halifax: Province of Nova Scotia, 1985.

Plunkett, T.J. "Municipal Collective Bargaining" (Paper prepared for the National Seminar on Collective Bargaining in the Public Service) 1972.

Ponak, Allen. "Public Sector Dispute Resolution. An American Twist to a Canadian Approach." Relations Industrielles Industrial Relations, v. 31 (1976), 537-551.

Ponak, Allen and Wheeler, Hoyt N. "Choice of Procedures in Canada and the United States." Relations Industrielles Industrial Relations, Vol. 19, No. 3, 292-308.

Price, Adam Robert William. "Back-to-Work-Legislation: An Analysis of the Federal and Ontario Governments' Increased Propensity to End Strikes by Ad Hoc Laws, 1950-1978," (unpublished), Kingston: Queen's University, 1980.

Public Service Labour Relations Board. Annual Report (Fredericton: Province of New Brunswick, 1981 - 1985.

Reid, Frank and Kervin, John and Gunderson, Morley. A Survey Analysis of The Determinants of Strikes in Canada. Ontario: Centre for Industrial Relations, University of Toronto, 1984.

Richard, Guy A. "Decision of Arbitrator in the Matter of An Act to Ensure Resumption and Continuation of Certain Non-Teaching Services in the Public Service and in the Matter of the Arbitration Provided for Under the said Act between the Canadian Union of Public Employees, New Brunswick Council of School Board Unions and Treasury Board, Province of New Brunswick", 1982.

Sasso, Carmen D. Coping With Public Employee Strikes. Illinois: Public Personnel Association, 1970.

Schuster, Michael H. Union-Management Cooperation. Michigan: W.E. Upjohn Institute for Employment Research, 1984.

Select Committee of the Legislature Established to Study The Labour Relations Act 1967 (Report of). Fredericton: Province of New Brunswick, 1967.

Sharples, Brian. "Report of the Fact Finder in the Matter of a Dispute Between the 'Boards' as defined in the Municipality of Metropolitan Toronto Act and the Branch Affiliates of the 'Elementary School Teachers' employed by the 'Boards' as defined in the Municipality of Metropolitan Toronto Act." Kingston: 1985.

Shearer, John C. "Dispute Settlement in the South" Industrial Relations Research Association, Proceedings of the 1981 Spring Meeting, April 29 - May 1, 1981, Huntington, West Virginia.

Siegel, Irving H. and Weinberg, Edgar. Labour-Management Cooperation. Michigan: W.E. Upjohn Institute For Employment Research, 1982.

Simmons, C. Gordon. Collective Bargaining at the Municipal Government Level in Canada. Ottawa: Privy Council Office, 1968.

Simmons, Gordon C. and Swan, Kenneth P. Labour Relations Law in the Public Sector. Ontario: Industrial Relations Centre, 1982.

Sosnow, Clifford. "Public Sector Collective Bargaining and Collective Withdrawal of Services: A Normative Analysis of Section 2(d) of the Charter of Rights and Freedoms". (Unpublished paper), 1985.

Strikes in Nova Scotia 1970-1985. Ed. Gilson, C.H.J. Hantsport, Nova Scotia: Lancelot Press, 1986.

Studies in Public Employment and Compensation in Canada. Ed. Meyer W. Bucovetsky. Montreal: Butterworth and Co. for the Institute for Research on Public Policy, 1979.

Subbarao, A.V. "Final-Offer-Selection vs Last-Offer-by-Issue Systems of Arbitration." Relations Industrielles Industrial Relations, v. 33 (1978), 38-56.

Swanson, Charles R. Jr. "A Typology of Police Collective Bargaining Employee Organizations." Journal of Collective Negotiations in the Public Sector, Vol. 6, No. 4 (1977), 341-348.

Task Force on Municipal Structure and Financing (Report of). Fredericton: Province of New Brunswick, 1972.

Tener, Barbara Zausner. Selected Proceedings of the Twenty-Eighth Conference Of The Association of Labor Relations Agencies (July 22-27, 1979). Fort Washington, PA: Labor Relations Press, 1980.

Thompson, Mark and Ponak, Allen. "Industrial Relations in Canadian Public Enterprises." International Labour Review, Vol. 123, No. 5, 1984. 647-663.

Thompson, Mark J. and Moore, Larry F. "Managerial Attitudes Toward Industrial Relations Public and Private Sectors". Relations Industrielles Industrial Relations v. 31 (1976), 359-366.

Twentieth Century Fund Task Force on Labor Disputes in Public Employment. Pickets at City Hall. New York: The Twentieth Century Fund, 1970.

Weiler, Paul C. "Making a Virtue Out Of A Necessity. Reflections on Strikes By Essential Public Employees."

Weiler, Paul. Reconcilable Differences. Toronto: The Carswell Company Limited, 1980.

Wells, Sally J. "Designation of Essential Employees in Hospitals". (Unpublished paper), 1985

Whalen, H.J. The Development of Local Government in New Brunswick. Fredericton, 1963.

Woods, H.D .Labour Policy In Canada 2nd ed. Toronto: MacMillan Company of Canada Limited, 1973, 19-42.

Woods, H. D., Chairman of the Task Force on Labour Relations. Canadian Industrial Relations. Ottawa: The Queen's Printer, 1969.

Woods, H. D. Report on Southern New Brunswick Construction Industry Industrial Relations and Synopsis of the Report. Fredericton, N.B.: Province of New Brunswick 1981.